OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA

From July 1, 1959 to June 30, 1960

COMMONWEALTH OF VIRGINIA
Department of Purchases and Supply
Richmond
1960
Letter of Transmittal

August 1, 1960

HONORABLE J. LINDSAY ALMOND, JR.
Governor of Virginia
Richmond, Virginia

My dear Governor Almond:

In accordance with § 2-93 of the Code of Virginia, I herewith transmit to you the Annual Report of the Attorney General. This report covers the period beginning July 1, 1959 through June 30, 1960.

Pursuant to the statutes, I have included in the Report such official opinions rendered by this office during the above-stated period as would seem to be of general interest or helpful in promoting uniformity in the construction of the laws of the State, together with the required statements of cases now pending and disposed of since the last Report issued by this office.

In the interest of economy, portions of the addresses, the salutations and signatures have been omitted.

Respectfully submitted,

A. S. HARRISON, JR.
Attorney General
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<tr>
<th>Name</th>
<th>City or County</th>
<th>Official Title</th>
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<tr>
<td>A. S. Harrison, Jr.</td>
<td>Brunswick County</td>
<td>Attorney General</td>
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<td>Kenneth C. Patty</td>
<td>Tazewell County</td>
<td>First Assistant</td>
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<td>D. Gardiner Tyler</td>
<td>Charles City County</td>
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<td>Margaret E. Bennett</td>
<td>Colonial Heights</td>
<td>File Clerk</td>
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<td>Helen B. Bowles</td>
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ARRTRNEYS GENERAL OF VIRGINIA
From 1776 to 1958

Edmund Randolph ............................................. 1776-1786
James Innes ..................................................... 1786-1796
Robert Brooke ................................................ 1796-1799
Philip Norborne Nicholas ....................................... 1799-1819
James Robertson .............................................. 1819-1834
Sidney S. Baxter .............................................. 1834-1852
Willis P. Bocock ............................................. 1852-1857
John Randolph Tucker ........................................... 1857-1865
Thomas Russell Bowden ........................................ 1865-1869
Charles Whittlesey (military appointee) ....................... 1869-1870
James C. Taylor .............................................. 1870-1874
Raleigh T. Daniel ............................................. 1874-1877
James G. Field ................................................. 1877-1882
Frank S. Blair .................................................. 1882-1886
Rufus A. Ayres .................................................. 1886-1890
R. Taylor Scott ................................................ 1890-1897
R. Carter Scott ................................................. 1897-1898
A. J. Montague .................................................. 1898-1902
William A. Anderson ........................................... 1902-1910
Samuel W. Williams ............................................ 1910-1914
John Garland Pollard ........................................... 1914-1918
*J. D. Hank, Jr. ............................................... 1918-1918
John R. Saunders ............................................... 1918-1934
†Abram P. Staples ............................................. 1934-1947
‡Harvey B. Apperson ........................................... 1947-1948
§J. Lindsay Almond, Jr. ....................................... 1948-1957
#Kenneth C. Patty ............................................. 1957-1958
A. S. Harrison, Jr. ............................................. 1958-

*Hon. J. D. Hank, Jr., was appointed Attorney General on January 5, 1918, to fill the unexpired term of Hon. John Garland Pollard and served until February 1, 1918.
†Hon. Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of Hon. Jno. R. Saunders and served until October 6, 1947.
‡Hon. Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of Hon. Abram P. Staples and served until his death on January 31, 1948.
§Hon. J. Lindsay Almond, Jr., was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of Hon. Harvey B. Apperson. Resigned September 16, 1957.
#Hon. Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of Hon. J. Lindsay Almond, Jr., and served until January 13, 1958.
CASES DECIDED IN THE SUPREME COURT OF APPEALS


Dose, Virginia Mae v. State Highway Commissioner. From Circuit Court of Fairfax County. Appeal from Interlocutory decree in condemnation. Dismissed.


NAACP v. Committee on Offenses against the Administration of Justice, et al. From Circuit Court of City of Richmond. Production of records before legislative committee. Affirmed.


REPORT OF THE ATTORNEY GENERAL


CASES PENDING IN THE SUPREME COURT OF APPEALS


Hossbill v. Commonwealth. From Circuit Court of Washington County. Appeal dismissed.


NAACP v. Commonwealth. From State Corporation Commission. Appeal from order requiring examination of membership lists, etc.

Near, Clyde Raymond v. Commonwealth. From Circuit Court of Powhatan County. Murder.

Panopoulos, James, sometimes called James Poulos, and Bessie Breedlove v. State Highway Commissioner. From Circuit Court of Giles County. Appeal in condemnation proceedings.


REPORT OF THE ATTORNEY GENERAL


Wade, Wallace Parker v. Commonwealth. From Circuit Court of Augusta County. Involuntary manslaughter.

White, Eloise J. v. State Highway Commissioner. From Circuit Court of Princess Anne County. Suit for mandamus to institute condemnation proceedings.

CASES PENDING IN THE SUPREME COURT OF THE UNITED STATES


Thomas, Harry R., Executor, etc. v. Commonwealth of Virginia. Certiorari to Circuit Court of Arlington County. Inheritance tax—paper money in safe deposit box.

CASES TRIED OR PENDING IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT


CASES TRIED OR PENDING IN THE UNITED STATES DISTRICT COURTS


CASES TRIED OR PENDING IN THE CIRCUIT, HUSTINGS, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS OF THE STATE


Capital Pictures Company v. Division of Motion Picture Censorship. Circuit Court, City of Richmond. Appeal from decision of the Division denying a license to exhibit the motion picture, Garden of Eden. Dismissed.

Capital Pictures Company v. Division of Motion Picture Censorship. Circuit Court, City of Richmond. Petition for writ of mandamus to require the Division to examine the motion picture, Garden of Eden. Pending.


Law, Blanche C. v. Sidney C. Day, Jr., Comptroller. Circuit Court, City of Richmond. Motion for judgment for damages in highway construction.


Lindsay, Winston S. and Margaret L. v. Commonwealth. Circuit Court, Buchanan County. Petition for correction of erroneous income tax assessments. Pending.


Modern Films Distributors v. Division of Motion Picture Censorship. Circuit Court, City of Richmond. Appeal from decision of the Division denying a license to exhibit the motion picture, Street Corner. Pending.


In re Estate of Victor J. Stoessel. Circuit Court, Fairfax County. Suit for probate and construction of a will. Pending.

Sands, Marks & Sands v. E. B. Pendleton, Treasurer of Virginia, and Mid-Union Indemnity Company. Circuit Court, City of Richmond. Suit to subject statutory deposit to claims of Virginia creditors. Pending.


Times Film Corporation v. Division of Motion Picture Censorship. Circuit Court, City of Richmond. Petition for injunction challenging the constitutionality of Chapter 11 of Title 2, Code of Virginia. Pending.


CASES TRIED OR PENDING BEFORE THE INDUSTRIAL COMMISSION OF VIRGINIA


HABEAS CORPUS CASES


Drew, Thomas P. v. Langlois. Superior Court, Providence, Rhode Island. Pending.


Hustings Court, City of Portsmouth. Pending.


REPORT OF THE ATTORNEY GENERAL


Trent, Lowery v. Blalock, etc. Supreme Court of Appeals of Virginia. Original petition. Pending.


REPORT OF THE ATTORNEY GENERAL


CASES TRIED OR PENDING IN THE CIRCUIT, LAW AND EQUITY, CHANCERY AND CORPORATION COURTS OF THE STATE IN WHICH THE DIVISION OF MOTOR VEHICLES WAS INVOLVED


Barber, Robert Dean v. C. H. Lamb, Commissioner of the Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Order of revocation rescinded (Chapter 209, Acts of 1960).

Bingaman, Neil v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Arlington County. Appeal from an action of the Commissioner pursuant to Section 46.1-419 revoking operator's license for a period of sixty days. Relief denied—case dismissed.

Blackburn, Amos v. C. H. Lamb, Commissioner of the Division of Motor Vehicles, Circuit Court of Gloucester County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Pending.

Brewster, Princess Lee v. Commissioner of Motor Vehicles, etc., Circuit Court of Henry County. Appeal from an action of the Commissioner suspending operator's license and registration privileges under Section 46.1-437. Operator's license surrendered to the Division. Pending.


Crumpacker, Sam Allen v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Botetourt County. Appeal from an action of the Commissioner revoking operator's license under Section 46.1-420 (reckless driving and speeding convictions). Pending.
Critzer, Frank Edward v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of the City of Hampton. Appeal under Section 46.1-437 from an action of the Commissioner revoking operator's license for a period of one year. Commissioner's action sustained.

Dean, Benjamin Walker v. C. H. Lamb, Commissioner of the Division of Motor Vehicles, Circuit Court of Bedford County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Form UM-1 filed. Order revoking license withdrawn.

DeCelle, Thomas Joseph v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner suspending operator's license and chauffeur's license for a period of sixty days. Action of the Commissioner sustained.


Farmer, Richard Harrington v. Chester H. Lamb, Commissioner of the Division of Motor Vehicles, Circuit Court of Princess Anne County. Appeal from an action of the Commissioner revoking operator's license and suspending registration under Section 46.1-167.2. Pending.


Gills, George William and Clara Stone Gills v. C. H. Lamb, Commissioner of the Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner revoking operator's licenses and suspending registration privileges under Section 46.1-167.2. Pending.

Gimpelson, Oscar v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of the City of Norfolk. Appeal under Section 46.1-437 suspending operator's license for sixty days (Section 46.1-420). Action of the Commissioner affirmed.

Gross, Frederick Moulton v. Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Revocation order rescinded (Chapter 209, Acts of 1960).

Hargrave, Wilson Garland v. Chester H. Lamb, Commissioner, Division of Motor Vehicles, Hustings Court, Part II, City of Richmond. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Judgment in favor of Hargrave.


Hester, Clarence Albert v. C. H. Lamb, Commissioner, etc., Circuit Court of Mecklenburg County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Pending.

Johnson, Eli v. C. H. Lamb, Commissioner, etc., Circuit Court of Caroline County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Case dismissed from the docket (claim by the parents of the deceased satisfied) order entered March 29, 1960.
REPORT OF THE ATTORNEY GENERAL


Leech, Howard Gilmore v. C. H. Lamb, Commissioner, etc., Circuit Court of Rockbridge County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license—afflicted with neurological or physical infirmities or disabilities. Pending.


Meadows, Aubrey Jefferson v. C. H. Lamb, Commissioner, etc., Circuit Court of Fairfax County. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license. Pending.

Moore, Ballard v. Commissioner of the Division of Motor Vehicles, Circuit Court of Bath County. Appeal under Section 46.1-437 from an action of the Commissioner revoking operator's license due to mental or physical infirmities or disabilities rendering it unsafe to drive a motor vehicle upon the highways. Operator's license surrendered.


Nice, Daniel B. v. Commonwealth of Virginia, Circuit Court, Part II of the City of Newport News. Appeal under Section 46.1-437 from an action of the Commissioner suspending operator's license for a period of sixty days. Commissioner's action modified from sixty days to twenty days. Operator's license surrendered.


Pearce, William V., Jr., v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Hustings Court of the City of Portsmouth. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Pending.

Richardson, Eddie Monroe and James Franklin Murray v. C. H. Lamb Commissioner, etc., Hustings Court, Part II, City of Richmond. Suit to enjoin Commissioner from revoking driving and registration privileges under Section 46.1-167.2. Orders of revocation rescinded (Chapter 209, Acts of 1960).
Rorrer, Raymond Taylor v. Commonwealth of Virginia, Circuit Court of Henry County. Appeal under Section 46-420 from an action of the Commissioner suspending the operator's license due to mental or physical infirmities or disabilities rendering it unsafe to drive a motor vehicle upon the highways. Judgment in favor of Rorrer—driving license restored by court.

Scioscia, Michael James v. Chester H. Lamb, Commissioner of the Division of Motor Vehicles, Hustings Court, Part II, City of Richmond. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Pending.


Shaffer, Ronald Wilson v. Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Revocation order rescinded (Chapter 209, Acts of 1960).

Sheets, Hugh Samuel v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Tazewell County. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2.

Sherwood, Frank M. and Helen Langan Sherwood v. Commissioner of the Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal under Section 46.1-167.2 from an action of the Commissioner suspending operating and registration privileges. Pending.

Sherwood, Frank M. and Helen Langan Sherwood v. Commissioner of the Division of Motor Vehicles, Corporation Court of the City of Staunton. Appeal under Section 46.1-167.2 from an action of the Commissioner revoking operator's license. Commissioner's action affirmed.


Tucker, Charles Knighton v. C. H. Lamb, Commissioner, Division of Motor Vehicles, Circuit Court of Alleghany County. Appeal from an action of the Commissioner suspending operator's license in accordance with Section 46.1-430. Operator's license surrendered for sixty days. Pending.

Tunstall, William Elden v. Chester H. Lamb, Commissioner, Division of Motor Vehicles, Hustings Court, Part II, City of Richmond. Appeal from an action of the Commissioner revoking operator's license and suspending registration privileges under Section 46.1-167.2. Pending.

Wallace, Edward Arthur and Dorothy W. Wallace v. C. H. Lamb, Commissioner, Division of Motor Vehicles, and G. T. Riggin, Director, Bureau of Safety Responsibility, Corporation Court of the City of Alexandria. Appeal from an action of the Commissioner revoking operator's licenses and suspending registration privileges under Section 46.1-167.2. Forms UM-1 filed—orders of revocation withdrawn and case dismissed.

Wallingford, Emery David v. Commissioner, Division of Motor Vehicles, Circuit Court of Fairfax County. Appeal under Section 46.1-437 suspending operator's license and registration plates for one year as result of an accident. Pending.

Weeks, Kenneth Gordon v. Chester H. Lamb, Commissioner, Division of Motor Vehicles, Hustings Court, Part II, City of Richmond. Appeal from an action
of the Commissioner revoking operator's license and suspending registration
privileges under Section 46.1-167.2. Order of revocation rescinded. (Chapter
Wilson, George Lee v. Chester H. Lamb, Commissioner, etc., Hustings Court,
Part II of the City of Richmond. Application for mandamus to issue operator's
license. Validity of the revocation of operator's license at issue. Application
denied.

CASES TRIED OR PENDING IN THE CIRCUIT, LAW AND EQUITY,
CHANCERY AND CORPORATION COURTS OF THE STATE IN
WHICH THE UNEMPLOYMENT COMPENSATION
COMMISSION WAS INVOLVED

Adams, Clarence, et al v. Unemployment Compensation Commission of Virginia
and Wise Coal and Coke Company. Circuit Court of Wise County. Pending.
Calihan, Margaret H. v. Unemployment Compensation Commission of Virginia
and Wythecille Knitting Mills, Inc. Decided in favor of the Commission.
Cox, Glenn, et al v. Unemployment Compensation Commission of Virginia and
Delp, Robert G. v. Unemployment Compensation Commission of Virginia and
Wiley N. Jackson. Circuit Court of Washington County. Pending.
Funkhouser, Violet v. Unemployment Compensation Commission of Virginia and
Jenkins, Silas, et al. v. Unemployment Compensation Commission of Virginia and
Norton Coal Company. Circuit Court of Wise County. Pending.
LeCompte, Cynthia E. v. Unemployment Compensation Commission of Virginia
and Tidewater Automobile Association of Virginia, Inc. Hustings Court of the
City of Portsmouth. Pending.
Hustings Court of the City of Richmond. Pending.
Martin, Everett J. v. Unemployment Compensation Commission of Virginia and
William S. Newbill Roofing Company. Hustings Court of the City of Ports-
mouth. Pending.
Sams, Earl K. et al v. Unemployment Compensation Commission of Virginia and
Wise Coal and Coke Company. Circuit Court of Wise County. Pending.
Unemployment Compensation Commission of Virginia v. Asbury Abrams, J. P.
Brown and W. Williams, and 187 other similar suits. Circuit Court of the City
of Richmond. Some contested, some were not.

EXTRADITION HEARINGS CONDUCTED AND REPORTS
SUBMITTED PURSUANT TO REQUEST OF
THE GOVERNOR

1959
October 28  Robert Tickle
December 15  Phillip O. Hudgins

1960
January 20  William Henry Anderson
February 9  Richard A. Pence
February 29  Helen Bailey (Hansen)
March 28  Joel Pierce
April 11  G. John Marconi
April 22  William A. Smith
May 12  Margaret Johnston Perkins
May 17  Doris Jane Karmasin
May 19  Hugh L. Hickman
June 22  William A. Smith (rehearing)
ACCOUNTANTS—Certified Public Accountant, Practicing Alone, May Not Adopt Firm Name—Firm Names Limited to Actual Partnerships. (79)

September 3, 1959

HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in reply to your letter of September 2, 1959, which reads as follows:

"Your opinion is requested in the following matter.

"Section 54-91, of the Code of Virginia, 1950, sets forth the requirements of partnership practice in the field of public accountancy.

"In your opinion, would it be permissible for a person who is a holder of a certificate of Certified Public Accountant, issued in accordance with the provisions of Chapter 5 of Title 54, Code of Virginia, to purchase the practice of a deceased person, who was a holder of a Certified Public Accountant certificate, and continue to practice as a company under the deceased person's company name; i.e., J. A. Jones & Company; thereby indicating or conveying to the public by the use of the aforementioned firm name that the practice is carried on by a company, denoting a partnership of two or more practitioners when in fact the practice is carried on by an individual certificate holder?"

Section 54-91 of the Code reads as follows:

"Any partnership practicing accountancy in this State may use the designation or practice as certified public accountants under a firm name only if all the members thereof are holders of certified public accountants' certificates granted under the laws of this State, and any partnership practicing accountancy in this State may use the designation or practice as public accountants under a firm name only if all the members thereof are duly registered and qualified as public accountants under the provisions hereof or are registered with the Board under the provisions of § 54-102. Each of the members of any partnership which shall use the designation 'certified public accountants' or 'public accountants' except upon compliance with the requirements hereinafter made shall be subject to the penalties prescribed in § 54-100."

The certificates authorized under the provisions of Chapter 5, Title 54 of the Code, are issued in the name of the person who qualifies pursuant to the provisions of Section 54-89 of the Code. These certificates entitle a holder to practice the profession of certified public accountant under his actual name. Section 54-91 authorizes two or more holders of such certificate, who have formed a partnership, to operate under a firm name. I do not feel this section contemplates that a sole proprietor may adopt and operate his profession under a firm name—this privilege being granted only when a partnership actually exists.

The statute does not expressly prohibit an individual who engages in the profession of certified public accountant, unassociated with any other accountant, from adopting a firm name, but, in my opinion, it is implied that this privilege is limited to a situation where a partnership exists.

Firm name, as used in the statute and in this opinion, means a name different from the actual name of the certificate holder.
REPORT OF THE ATTORNEY GENERAL

ALCOHOLIC BEVERAGE CONTROL LAWS—Alcoholic Beverage Prohibited in Country Store if Food and Refreshments are Sold for Consumption on Premises. (359)

May 20, 1960

HONORABLE MARK D. WOODWARD
Judge, Juvenile and Domestic Relations Court of Page County

This is in reply to your inquiry of May 17, 1960 which is set forth in full as follows:

"Your opinion is requested as to Section 4-61, Code of Virginia, 1950, as amended, which reads in pertinent part, as follows:

"'No alcoholic beverages shall be kept or allowed to be kept upon any premises or upon the person of any proprietor or person employed upon the premises of a restaurant, soda fountain, or other place where food or refreshments of any kind are furnished for compensation, * * *.' Emphasis supplied.

"The question arose as to whether the italicized portion of the statute would include a rural country store where soft drinks and crackers were sold to customers and to a case in which the owner admitted that one pint of the two pints of A.B.C. whiskey found on the premises belonged to him and denied knowledge as to the other pint.

"It is my opinion that the statute is broad enough to cover such a situation and I would appreciate the view of your office."

The meaning of the word "furnished", as used in the statute, is necessarily controlled by its use in conjunction with the words "restaurant" and "soda fountain". In an earlier opinion, dated August 26, 1959 and addressed to the Honorable Kenneth P. Asbury, Commonwealth's Attorney for the County of Wise and the City of Norton, I considered an almost identical question. In that opinion, the conclusion was expressed that sales of the type which you have described would bring a grocery store within the scope of the statute if the sales were for on-premises consumption. It was not felt that typical grocery store sales, for off-premises consumption, would provide a basis for invoking the statute.

Having again considered this question, I find myself in agreement with your conclusion that the statute is broad enough to cover the situation which you have described if the food and refreshments are sold for consumption on the premises of the country store.

ALCOHOLIC BEVERAGE CONTROL LAWS—§ 4-61 of Code Applicable Where Food or Refreshments Sold for On-Premises Consumption. (76)

August 26, 1959

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for County of Wise & City of Norton

This is in reply to your letter of August 20, 1959 in which you refer to Section 4-61 of the Alcoholic Beverage Control Act and pose the following question:

"Would you please advise me whether or not in your opinion this section of the Code would apply to a filling station which sells Coca Colas, soft drinks, nabs, candy, potato chips, etc.? Also, whether or not it would apply to a grocery store?"
The provisions of this statute are clearly applicable to places at which a restaurant or soda fountain type of business is conducted, i.e., furnishing for compensation food or refreshments of any kind for on-premises consumption. If the business conducted at a given place embodies these elements, then the place falls within the proscriptions of Section 4-61. On the other hand, mere sale of foodstuffs for removal and off-premises consumption is not sufficient to invoke the statute.

Barring collateral activity of the type first considered, it would appear that Section 4-61 would not apply to a grocery store or filling station. If such collateral activity is conducted or condoned, as might well be the case with the filling station business which you have described, Section 4-61 could certainly be invoked even though the primary business conducted at the place had no connection with the sale of food or refreshments.

ALCOHOLIC BEVERAGE CONTROL LAWS—Sunday Sales—Effect of County Ordinance in Newly Incorporated Town. (186)

December 16, 1959

HONORABLE FELIX E. EDMUNDS
Member of the House of Delegates

This is in reply to your inquiry of December 3, 1959 which was as follows:

"The Village of Craigsville in Augusta County, Virginia, was by order of the Circuit Court of Augusta County dated October 31, 1959, duly incorporated as a Town subject to all the duties, responsibilities and privileges conferred upon Towns under the general law in Virginia. The order of incorporation further provided for the election of a Mayor and Town Council and that after the entry of the order and the election, the said Town to function as such, beginning at the first moment of January 1, 1960.

"At the present time there are certain merchants in the said Town holding licenses under the Virginia Alcoholic Beverage Control Act and the question has been raised as to whether these licensees can continue to sell alcoholic beverages as permitted by their licenses without prior enactment of Town Ordinances authorizing the sale and dispensing of alcoholic beverages within the corporate limits of the said Town after January 1, 1960. Further, the County of Augusta by ordinance prohibits the sale of alcoholic beverages on Sunday and the question has been raised as to whether the duly organized town beginning January 1, 1960, can by Ordinance authorize and approve the sale of alcoholic beverages as permitted in the State of Virginia in the Town on Sundays."

As a rule, no affirmative action by local governing bodies is required to legalize the sale of alcoholic beverages within their respective jurisdictions—either generally or on Sundays. This subject is covered on a statewide basis by the provisions of the Alcoholic Beverage Control Act. Pursuant to the provisions of that act, the sale of alcoholic beverages by licensees of the Alcoholic Beverage Control Board is permitted throughout the Commonwealth and without any restriction as to Sunday sales.

The Alcoholic Beverage Control Act does permit the localities to conduct elections resulting in a complete or partial prohibition of the sale of alcoholic beverages within the political subdivision. See Code Sections 4-45 et seq. That act also empowers the governing bodies of counties, cities or incorporated towns to enact
ordinances prohibiting or restricting the sale of alcoholic beverages on Sundays. See Code Section 4-97. The answers to the two questions posed by your letter would appear to depend upon whether or not some prior action by the voters or governing body of Augusta County will continue to be effective in the incorporated town of Craigsville so as to render general sales or Sunday sales of alcoholic beverages illegal in that town until such time as the town can act to nullify the county policy.

As to the general sale of alcoholic beverages, there appears to have been no Augusta County election resulting in the prohibition of such sales. Thus, there is no necessity for deciding whether or not such an election would be binding on the town.

As to sales of alcoholic beverages on Sundays, which are prohibited by an Augusta County ordinance, the Alcoholic Beverage Control Act, in Section 4-96 thereof, includes a general withdrawal of local control over the subject of alcoholic beverages. Section 4-97 returns a limited power to prohibit or regulate Sunday sales. That statute reads in pertinent part as follows:

"The governing body of each county shall have authority to adopt ordinances effective in that portion of such county not embraced within the corporate limits of any city or incorporated town, and the governing body of each city and town shall have authority to adopt ordinances effective in such city or town, prohibiting . . ."

Construing the foregoing language, it appears clear that the actions of a county in this field are not binding upon an incorporated town situate therein. This conclusion is reinforced by the fact, to which you have made reference, that the newly incorporated town is vested with "all the powers, privileges and duties conferred upon and appertaining to towns under the general law." See Code Section 15-67. I am aware of no statute or rule of law which would override the obvious legislative intention and require that, under these circumstances, the county ordinance be recognized as effective in the town until nullified by the governing body of the town. Therefore, it is my opinion that no further action will be required in order to legalize the sale of alcoholic beverages in Craigsville on Sundays.

ALCOHOLIC BEVERAGE CONTROL LAWS—Taxes—Proper to Include Tax Imposed by Section 4-24 of the Code in Price in Order to Calculate Tax Imposed by Section 4-15.1 of the Code. (318)

April 21, 1960

VIRGINIA ALCOHOLIC BEVERAGE CONTROL BOARD

This is in reply to your letter of April 8, 1960, with reference to the new § 4-15.1 of the Code of Virginia, enacted as Chapter 393, Acts of Assembly, 1960, which will impose a State tax upon alcoholic beverages sold either by or through Virginia Alcoholic Beverage Control Board and upon all other wine sold to licensees of the Board. Your inquiry is as follows:

"Please be kind enough to advise the Board whether the 35 cents per gallon tax provided for in Section 4-24 may lawfully be included in the price of wine before the 10 per centum tax provided for in Section 4-15.1 is calculated or whether the former tax should be excluded from such price in calculating the latter tax, not only on wine sold by the board or wholesale wine distributors to retail licensees but on wines sold by the Board to persons other than retail licensees."
In subsection (a) of § 4-15.1, the General Assembly provided for the collection of the tax, in part, as follows:

"The State tax hereby levied shall be collected by the Board as to each sale of alcoholic beverages made either by or through the Board from the purchaser of such alcoholic beverages at the time of or prior to such sale; and the State tax hereby levied shall be collected by the Board as to each sale of wine made by a wholesale wine distributor to a retail licensee from the person making such sale. In establishing the prices for items sold by it, the Board shall add the amount of the tax hereby levied to the price of each package of alcoholic beverages; provided, however, that the final price for each package may be established so as to be divisible by five. As to sales by or through the Board, the tax provided for by this section shall be computed by the Board on all net sales for each quarter by dividing the total net sales for the quarter by 1.10 and multiplying the result by ten per centum."

Subsections (b), (c) and (d) contain the remaining provisions applicable to the amount and collection of the tax. I quote these paragraphs here for ready reference:

"(b) On all wine sold to retail licensees, the State tax imposed hereby shall be ten per centum of the price charged such retail licensees; on all wine sold by the Board to persons other than retail licensees, the State tax shall be ten per centum of the price charged for such wine."

"(c) On all other alcoholic beverages sold by or through the Board, the State tax shall be ten per centum of the price charged by the Board."

"(d) To enable the Board to collect the State tax hereby levied from wholesale wine distributors, such distributors shall make such reports in such manner and at such times as the Board may from time to time require and shall pay the State tax hereby levied to the Board at or prior to each sale of wine to a retail licensee or at such other time or times as the Board shall require."

It is my opinion that in calculating the "price" of each package of wine sold by or through the Board to retail licensees or to persons other than retail licensees, the amount of the "State tax" imposed by § 4-24 of the Code should be included in such price before applying the ten per centum tax thereto in order to determine the "final price." Similarly, the 10% tax levied by the new Code section should be applied to the sales price in which is included the 35¢ a gallon tax, for each package sold by a wholesale wine distributor to a retail licensee.

The only real question to be considered in this regard is the definition or meaning of the word "price" as used in the new statute. A somewhat similar question was considered by our Supreme Court of Appeals in 1947 in Straus Beverage Corporation v. Commonwealth, 185 Va. 1035, 41 S. E. 2d 71. In that case, in considering whether the amount of excise tax on beer should be a part of the "amount of purchases" on which was based a wholesale merchant's license tax, the Court quoted with approval from Lash's Products Company v. United States, 278 U. S. 175, 176, 49 S. Ct. 100, 73 L. ed. 251, a definition of "price" as follows:

"The price is the total sum paid for the goods. The amount added because of the tax is paid to get the goods and for nothing else."

Our Court went on to say, at page 1064 of 185 Va.:

"Whether the tax is on the manufacture or on the sale, the obligation to pay it is the obligation of the manufacturer, who must affix evidence of payment before he delivers to the wholesaler, and who incurs a penalty if he does not so do; and whether he invoices the amount of it
to the wholesaler separately or 'buries it in the price', the dollars and cents result to the wholesaler is the same, and the amount of his purchase is the total amount he pays to get the beer.

“This conclusion is in no wise in conflict with Southern Biscuit Co. v. Lloyd, 174 Va. 299, 6 S. E. 2d. 601. In fact, it may be said of this case, as Mr. Justice Spratley said of that (p. 312): ‘This is not a case of the buyer putting the seller in funds to pay a tax; but it is a case in which the tax is a part of a composite price to be paid for the product in any event.’”

Mr. Justice Buchanan, in the Straus case continues:

“Nor does the conclusion result in double taxation or illegal discrimination. The State excise tax paid by the manufacturer, like the federal excise tax, income taxes and other taxes, is reflected in what he charges the defendant for his product. The license tax assessed against the defendant is computed on that total charge. No double taxation is involved in that procedure. * * *.”

Further, the history of § 4-24 of the Code strengthens the theory that the word “price,” as used in Chapter 393, means the total price of the article to the purchaser thereof. You will recall that in 1944, when § 4-24 was adopted, OPA regulations were such that the Board was limited in its markup on wines. The General Assembly, in order to derive additional revenue, then imposed the “tax” of 35¢ a gallon in addition to any markup charged by the Board and provided for its distribution in almost exactly the same manner as the distribution of the net profits of the Board under § 4-22 of the Code.

I understand that the Board publishes both wholesale and retail price lists of wines, on which the quoted price of any item includes actual cost, Board markup and the 35¢ a gallon tax. Wholesale wine distributors, in making sales to retail licensees, include the 35¢ a gallon tax in their prices. It follows that the “price” of any item of wine sold by or through the Board or by a wholesale wine distributor to a retail licensee necessarily includes the amount of the “State tax” imposed by § 4-24. It is upon this basic price that the new ten per centum tax is to be applied.

ALCOHOLIC BEVERAGE CONTROL LAWS—Transportation of Legally Acquired Alcoholic Beverages—Mistake of Fact by Operator of Vehicle. (244)

February 19, 1960

HONORABLE L. MELVIN GILES
Commonwealth’s Attorney for Pittsylvania County

This is in response to your letter of January 3, 1960 in which you set forth the following hypothetical case and questions:

“John Doe, who is from Baltimore, Maryland, with John Smith stopped at a Pittsylvania County ABC Store to purchase some legal whiskey. John Doe, who is the owner of the automobile, purchased one gallon of whiskey and his companion, John Smith, purchased one gallon and one fifth. The amount of the purchase by John Smith was unknown to John Doe, owner of the automobile. Both parties failed to secure a permit to transport over a gallon of whiskey.

“Under the foregoing set of facts, may John Doe be convicted of transporting over the gallon limit allowed under Title 4, Section 72 of
the Code of Virginia of 1950, as amended? (2) Is John Doe criminally responsible under Title 4, Section 72 of the Code of Virginia of 1950, as amended, for the whiskey transported in excess of one gallon by John Smith? (3) May the Commonwealth confiscate John Doe's automobile on the above set of facts? (4) If there are three persons in the same automobile, are they permitted under Title 4, Section 72 of the Code of Virginia of 1950, as amended, to legally transport as much as one gallon per person, making a total in this case of three gallons?"

Title 4, Section 72 of the Code of Virginia reads in pertinent part as follows:

"The transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell the same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this chapter, within, into or through this State in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Board pursuant to this section.

* * *

"Any person who shall transport alcoholic beverages, other than wine and beer purchased from persons licensed to sell the same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this chapter, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and punished as provided in § 4-92."

Pursuant to the foregoing, the Alcoholic Beverage Control Board adopted Section 42 of its regulations which, after establishing a general requirement that persons transporting alcoholic beverages within, into or through the Commonwealth post a bond with the Board, carry an Evidence of Bond certificate in their vehicles, and follow certain other prescribed procedures, provided exceptions to these general requirements, including the following:

"(b) Exceptions.—The provisions of subsection (a) of this section shall not apply to the following:

* * *

"3. A person transporting lawfully acquired alcohol or spirits from one point in Virginia to another point in Virginia or to a point outside of Virginia for his own use and not for resale; provided, however, that if the quantity of alcohol or spirits exceeds one (1) gallon, such transportation shall be engaged in only upon permit issued by the Board, which must accompany the alcohol or spirits being transported.

"Nothing in this regulation shall prevent or prohibit the transportation of alcohol or spirits in amounts in excess of one (1) gallon in a vehicle occupied by more than one person, provided that such alcohol or spirits shall have been lawfully acquired and are in the possession of the bona fide owner thereof and, provided further, that no person in such vehicle shall have more than one (1) gallon of such alcohol or spirits without a permit from the Board to transport the same."

As you are aware, under certain circumstances not now before us, quantities of spirits in excess of one gallon may be transported, without compliance with the basic provisions of Section 42, under permits issued by the Board.

The provisions of Section 42 of the Board's regulations, incorporated by reference in Code Section 4-72, clearly would permit the transportation of three gallons of spirits by three persons in one automobile, without bond or permit, provided that the spirits were lawfully acquired and that each gallon was in the
possession of the bona fide owner thereof. In the instant case, the presence of the odd fifth of whiskey renders the entire transportation illegal and subjects the vehicle to the forfeiture provisions of Section 4-56 of the Code. See opinion of Judge Almond, then Attorney General, issued May 10, 1949 to Honorable W. Carrington Thompson, Commonwealth's Attorney for Pittsylvania County, Report of the Attorney General, 1948-1949, p. 3. Doe stands to lose his car unless he can sustain the burden of demonstrating himself to be an "innocent owner" within the language of subsection (h) of that statute. See Bandy v. Commonwealth, 185 Va. 1044, 1052. This language does not appear to be calculated to relieve an owner in Doe's position who, by hypothesis, may be held criminally liable for the illegal transportation. In fact, his failure to apprise himself of the quantity of whiskey purchased by Smith might be held to constitute implied consent which, under the statute, would negate his claim of innocence.

As to a criminal prosecution under Section 4-72, the essential question is whether Doe did or did not transport the whiskey. From the tenor of your inquiry, I take it that Doe was operating the car. Under those circumstances, it would appear to be reasonable to conclude that he did transport the whiskey, particularly in view of his apparent knowledge that Smith was in possession of an unknown quantity of alcoholic beverages. The criminal provisions of Section 4-72 do not involve the element of scienter or guilty knowledge. Doe's mistake of fact as to the quantity of whiskey is not a bar to prosecution under the statute. See Bracy v. Commonwealth, 119 Va. 867, 870, 871.

The questions of whether or not Doe transported the whiskey and whether or not he was an "innocent owner" are, of course, for the judge or jury to determine in the light of the exact circumstances of the case.

P. S. I trust that your questions are purely hypothetical and that no litigation is pending involving the same. As you know, it is not the custom of this office to render official opinions for use in pending litigation.

ANNEXATION—Expenditure of School Funds to Defend Suit—May Not be Expended Where County Lays Specific School Levy. (271)

March 21, 1960

HONORABLE EDW. H. RICHARDSON
Commonwealth's Attorney for Roanoke County

This is in reply to your letter of March 18, 1960, which reads as follows:

"Roanoke County is forced to defend an annexation suit brought by the City of Roanoke, in which the City is attempting to obtain thirty-one square miles of the County's area. The schools of Roanoke County will, of course, be vitally affected by this suit, and since most of the taxes of Roanoke County go for school purposes, the Board of Supervisors and the School Board wish to have an opinion from you as to whether or not the School Board can advance funds to the County to be used for the defense of said suit."

It is my understanding that Roanoke county lays a specific levy for public school purposes and that the school funds are not derived from appropriations made by the board of supervisors out of general fund receipts. If this is true, I am of opinion that the school board of the county does not have the power to expend any of the school funds for the purpose suggested.

Under § 15-9 of the Code, the board of supervisors may employ counsel to assist the attorney for the Commonwealth in opposing the annexation proceedings. In this connection you are referred to the case of Campbell v. Howard, 133 Va. 19, 112 S.E. 876.
ASSESSMENTS—Real Estate—City Assessor Must View Each Parcel Prior to Increase. (89)

September 17, 1959

HONORABLE WILLIS W. BOHANNAN
City Attorney, City of Petersburg

This is in reply to your letter of September 16, 1959, in which you request my opinion as to whether the assessor for the City of Petersburg, appointed under Chapter 4-A of its charter (Chapter 265, Acts of 1956) may make a general percentage increase of all assessments—that is, an "across the board" increase. You indicate that it would not be practical for the assessor to view each separate piece of property within the time necessary to complete the assessments on real estate for the year 1960.

In my opinion, such an assessment would be invalid, as being in a manner contrary to the requirements of Section 58-790 of the Code. In my opinion, the assessor may not, on the basis of records in his office, increase all assessments of real estate by a certain percentage without actually examining the individual property.

ATTACHMENTS—Non-Residents May Secure Attachment in Virginia Court of Sums Owed Non-Resident Debtors by Virginia Residents. (293)

March 30, 1960

HONORABLE C. H. COMBS
Judge, County Court of Buchanan County

This is in reply to your letter of March 29, 1960, which reads as follows:

"Living on the border of Virginia and West Virginia and Kentucky, the County Court of Buchanan County is troubled with attachments from both West Virginia and Kentucky against residents of those states who work in Virginia.

"In each instance the debt is made in another state and the plaintiff and defendant are both residents of the other state. The plaintiff comes to Virginia and swears out an attachment alleging that the defendant is not a resident of the State of Virginia, but in some instances they are both residents of the same town in West Virginia and are both non-residents of Virginia.

"There was formerly, I believe, a section of the code which provided that a debt could not be transferred from one state to another for the purpose of obtaining an attachment on the ground the defendant was not a resident of the state. I have been unable to find this section in the new code, but would like to find some way to prevent these non-residents from getting an attachment against their neighbors on the ground of non-residency, if this is possible.

"Would you please advise me whether it is proper for a non-resident to come to Virginia and sue another non-resident by attachment on the ground that the latter is a non-resident of the state of Virginia."

I am unable to find any statutory provision such as you mention in the third paragraph of your letter. By reference to §§ 8-519 and 8-520 of the Code, it will be observed that the place of residence of the principal defendant or one of the principal defendants must be outside the State of Virginia if the non-residency ground of attachment is present.
There is no reference in these sections or in any of the provisions of Chapter 24 of Title 8 indicating that the place of residence of the creditor is important. I am unable to find any recent Virginia cases upon the point in question. However, it appears that this question has been decided by the Supreme Court of Virginia on two occasions in the following cases: Peter v. Butler, 1 Leigh (29 Va.) p. 285; and, 6 Munford (20 Va.) p. 176.

In both of these cases the assets sought to be attached were in the hands of firms or persons in Virginia but both the principal defendant and the person suing out the attachment were non-residents of Virginia.

In view of these cases and the statutory provisions relating to attachments, I am of opinion that the question presented in the fourth paragraph of your letter must be answered in the affirmative.

ATTORNEYS AT LAW—Legal Reference Programs—Virginia State Bar May Encourage. (145)

HONORABLE R. E. BOOKER
Secretary-Treasurer
Virginia State Bar

November 6, 1959

This is in reply to your letter of October 29, 1959, which is as follows:

"The Virginia State Bar for many years has had a program of legal aid and legal reference that we have tried to get the local bar association to take over. The 1956 General Assembly passed an act requiring all Legal Aid Societies to be licensed by the Virginia State Bar. This act made no reference to a legal reference or legal referral program.

"I would appreciate your advising me whether or not there is any legal reason why the Virginia State Bar should not encourage local bar associations to adopt a legal reference or legal referral program."

The 1956 Act to which you refer was designated as Chapter 47, Acts of Assembly, 1956, Extra Session, and was amended in 1958 to add subsection (3a) by Chapter 253, Acts of Assembly, 1958. These Acts of Assembly are now codified as §54-52.1, as amended, Code of Virginia.

I am advised that the legal reference or legal referral program to which you refer entails a local bar association polling its members and determining which of them are willing to serve on a legal reference or legal referral committee. The public is advised that these attorneys at law are available for conference at a fixed fee, depending on the length of the conference. The problem presented by the client is then carefully considered and the client advised as to the merits. Then, the attorney consulted may represent this client in the matter, again at a fee agreed upon, or may refer the client to other members of the Bar.

There is a basic difference between this type of a legal reference or legal referral program and a legal aid society required to comply with the rules and regulations promulgated by the Virginia State Bar pursuant to §54-52.1 of the Code. In the case of the legal reference or referral program, each person consulting one of the attorneys serving in the program is expected to pay, and does pay a fee for the services rendered, whereas the legal aid societies and attorneys who fall within the purview and prohibitions of §54-52.1 render legal assistance to those requiring such assistance, but unable to pay therefor. I am of the opinion that there is no legal reason why the Virginia State Bar should not continue to encourage local bar associations to adopt a legal reference or legal referral program.
REPORT OF THE ATTORNEY GENERAL

BANKS—Savings and Loan Associations—May Not Include “Savings and Loan” in Name Unless Engaged in Such Business. (307)

April 11, 1960

HONORABLE JAMES W. ROBERTS
Member, House of Delegates

This is in reply to your letter of April 7, which reads as follows:

“I am enclosing herewith a photostat copy of a letter received from the Norfolk Savings and Loan Corporation, of which I am a Director, from Mr. Ritchie, Commissioner of Banking. The letter from Mr. Ritchie is self-explanatory. When House Bill No. 139 was explained in the last session I asked the question whether the provisions of the bill would affect those Savings and Loan Associations that had been conducting their business under that title in the past. I was assured that it would not.

“To quote from the title of House Bill No. 139, ‘to provide generally for the conduct of the savings and loan business and for the authorization, regulation and supervision of those proposing to engage or engaging in such business.’ It was upon this phraseology I posed my question above outlined.

“The Norfolk Savings and Loan Corporation was chartered in 1915 and has successfully conducted its business through good times and bad with regular inspections by the State Banking Commission, and I am, therefore, anxious to have a ruling at this time if in your opinion you feel under the amendment recently passed and which becomes effective July 1 next it is still necessary that the title be changed in accordance with Mr. Ritchie’s letter.”

Upon receipt of your letter we obtained a copy of the Charter of the Norfolk Savings and Loan Corporation, together with subsequent amendments. This corporation was chartered under the provisions of Chapter 1 of Chapter 270, Acts of 1902-3-4, and granted the powers of a “savings and loan” or “building and loan” organization, as at that time these two names were used interchangeably to describe the same type of business.

By Chapter 74, Acts of 1920, the General Assembly enacted a law authorizing the establishment of industrial loan associations, and, as a result, Norfolk Savings and Loan Corporation filed its application for an amendment to its charter so as to change from a savings and loan corporation to an industrial loan corporation, which application was granted on April 29, 1920. Since that time your company has continued to operate under its amended charter and under its original name.

House Bill No. 139, in paragraph (a) of Section 6-201.49, prohibits a person (person includes a corporation) not engaged in the business of a savings and loan association in this State under the provisions of H. B. No. 139 from having a corporate name containing the words “savings and loan,” “building and loan” or other words indicating that its office is the office of a savings and loan association.

Upon first impression we questioned the constitutionality of this provision in so far as it affects a business such as yours that was operating under a charter granted prior to the effective date of H. B. No. 139. We conferred with Honorable Ralph T. Catterall, Chairman of the State Corporation Commission, with respect to this matter, and he has written a letter to Mr. Kenneth C. Patty, Assistant Attorney General, stating his views and the historical background of H. B. No. 139. I am enclosing a copy of this letter.

H. B. No. 139 contains no “grandfather clause” which would prevent the application of the new statute to your corporation. I feel that I must concur in the conclusions reached by Judge Catterall upon the constitutional question.
It would seem that if your corporation wishes to continue to operate under its present name it may again amend its charter so as to have authority to conduct a savings and loan business instead of an industrial loan business, if such a change in the judgment of the directors and stockholders would be more advantageous than surrendering the present corporate name.

It is unfortunate that a clause was not inserted in the bill for the protection of the four industrial loan associations that are affected.

BOARD OF SUPERVISORS—Authority—To Donate to Charitable Corporation to Provide Services in Addition to Rescue Operations. (381)

HONORABLE LEONARD F. JONES
Commonwealth's Attorney for Campbell County

This is in reply to your letter of June 7, which reads as follows:

"The question has arisen whether or not Campbell County may legally donate an amount in excess of that set forth in Section 15-16.2 of the Code of Virginia to the Altavista Life Saving and First Aid Crew, Incorporated, a voluntary nonprofit philanthropic organization which, in addition to rescue operations, furnishes crutches, wheelchairs, oxygen, and other services to indigent persons, without cost to the patients."

Under Section 15-16 of the Code, subject to the proviso therein set forth, the governing body of counties, cities and towns may make appropriations of public funds to any charitable institution or association located within their respective limits. Prior to an amendment of this section by Chapter 225 of the Acts of Assembly of 1960, which became effective March 9, 1960, this section was applicable only to cities and towns.

If it can be established that the Altavista Life Saving and First Aid Crew, Incorporated, is a charitable corporation, in my opinion the board of supervisors could make appropriations in support of such corporation's undertakings which are carried on in addition to the rescue operations provided for in Section 15-16.2, and that grants to the corporation for the furnishing of crutches, wheelchairs, oxygen or other services to indigent persons free of charge would be authorized by this section as amended as set forth above.

BOARD OF SUPERVISORS—Authority—To Pay Jailor or Deputy Sheriff to Act as Janitor. (380)

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for Wise County

This is in reply to your letter of June 4, which reads as follows:

"Sometime ago you ruled that a Board of Supervisors could not employ a jailer and deputy sheriff as janitor of the courthouse.

"The jailer of Wise County takes care of the Juveniles in a separate part of the jail. Can the Board of Supervisors pay him from the general county funds an additional salary, in addition to his salary as deputy sheriff, for taking care of the Detention Home?"
Your attention is called to the last paragraph of Section 15-504 of the Code, which reads as follows:

"Nor shall this section apply to the compensation of sheriffs or their deputies who also serve as jailors for their counties; nor to the employment of a sheriff of a county or his deputy as janitor for a county building or buildings."

This amendment has the effect of overruling our previous opinion to the effect that the employment of a sheriff or a deputy as a janitor would be in violation of this section. Under this section the county may pay a sheriff or his deputy an additional salary for acting as janitor for any county building or buildings.

BOARD OF SUPERVISORS—Authority to Supplement Salary of Judges of Courts of Record. (400)

June 22, 1960

HONORABLE JOHN W. EGGLESTON
Chief Justice of the Supreme Court of Appeals

This will acknowledge your letter of June 20 relating to the authority of a board of supervisors to supplement the salaries of judges of courts of record.

I am enclosing copy of an opinion rendered by the late Mr. Justice Staples during his tenure of office as Attorney General, in which he refers to the Norfolk case mentioned in your letter (Attorney General Report for 1945-'46, at p. 11). You will note that Attorney General Staples concurred in the decision which you have cited, but, in the terminal paragraph of the opinion, he made this statement:

"While the Constitution confers direct authority upon the councils of cities to increase salaries of their Judges, there is no prohibition against the General Assembly conferring like authority upon Boards of Supervisors, and, in my opinion conferring such authority would not be in violation of the Constitution."

Subsequently, Attorney General Apperson rendered an opinion to the Commonwealth's Attorney of Henrico county, in which he stated that under the provisions of § 2743 b (now § 15-10) counties coming within the scope of this section could supplement the salaries of judges of courts of record. § 14-48 of the Code is a general law and this office has on several occasions held that where a county qualifies under § 15-10 it becomes vested with the same powers and authority granted to cities under general law. We have taken the position that § 15-10 does not grant to a county the authority vested in a city by its charter, unless such authority is also vested under general law.

§ 15-10 of the Code (formerly 2743 b) had not been enacted when the Norfolk case came up in 1910. The Supreme Court, in the case of Kilgour v. Board of Supervisors, 195 Va. 562, held that § 15-10 of the Code is a general law.

It is probable that in the Norfolk case, the court was of opinion that Chapter 2, Acts of 1910, was special legislation in violation of §§ 63 and 64 of the Constitution.

I appreciate your bringing this matter to my attention, and I trust that you are in accord with the views herein expressed.
BOARD OF SUPERVISORS—Capital Improvements—May Create Building Fund For. (160)

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney for King George County

November 21, 1959

This is in reply to your letter of November 21, 1959, which reads as follows:

"About one year ago, the Board of Supervisors of this County created a building fund for the purpose of constructing an annex to the Court House building for additional office space to house county officials, etc. At that time, they appropriated $10,000.00 of this fund. About one or two months ago they appropriated an additional $10,000.00 to be added to this fund. They propose to appropriate the third $10,000.00 at their meeting on the 3rd of December, 1959, making a total appropriation of approximately $30,000.00 in the fund. No bond issue is involved, the appropriations being cash from current receipts.

"I have advised the Board that when they have sufficient funds to pay for the entire building project they may legally enter into a contract for the same, not exceeding their cash appropriations.

"A number of citizens have questioned the wisdom of the Board with respect to this building plan and have also questioned its legality. Please advise whether under the facts given above the Board may legally let its contract on December 3rd, 1959."

In my opinion the Board of Supervisors has authority to carry out the proposed project. This authority is contained in Chapter 21, Title 15 of the Code. Sections 15-689 and 15-693 specifically relate to such power.

BOARD OF SUPERVISORS—Compensation of Members—Fixed by Statute—May Not be Reduced by Board to Amount Below Minimum Over Objection of Any Member. (263)

HONORABLE THOMAS STARK, III
Commonwealth's Attorney for Amelia County

March 10, 1960

This is in reply to your letter of March 8, 1960, which reads as follows:

"I have been requested by Mr. J. M. Borum, Amelia County Board of Supervisors to write you concerning the salaries of the members of the Board of Supervisors in Amelia County. According to section 14-56.1 of the 1950 Code of Virginia, as amended, the annual compensation to be allowed each member of the Amelia County Board of Supervisors is $1200.00. The annual compensation was raised from $300.00 to $1200.00 by the General Assembly of 1956.

"Mr. Borum intends to propose to the Amelia County Board of Supervisors that the annual compensation be reduced from $1200.00 to $600.00. In light of section 14-56.1 and section 14-57 paragraph 29 of the Code of Virginia, as amended, does the local Board of Supervisors have the power to reduce their annual salaries below the amount set forth in the Virginia Code? If the local Board of Supervisors has the power to reduce their annual compensation, must the vote be unanimous or may the resolution be carried by majority vote?"
Section 14-56.1 of the Code provides that:

"After January one, nineteen hundred and sixty, the annual compensation to be allowed each member of the board of supervisors of any county shall be as follows:

* * * * * *

"Amelia—twelve hundred dollars."

This section fixes the annual compensation of each member of the Board in Amelia County at twelve hundred dollars and does not empower the Board to reduce a member's salary over the objection of any member whose salary would be reduced. This conclusion is supported by other provisions of this section wherein the compensation may be not less than a minimum amount nor more than a maximum. For example, it is noted that in the county of Bath the compensation may be fixed at not less than three hundred dollars nor more than six hundred dollars. A similar discretion is not given to the Board of your county.

Of course, a resolution by the Board which is agreed to by all the members providing for a salary less than twelve hundred dollars would be valid.

Section 14-57 to which you refer, was repealed by Chapter 340, Acts of 1958.

BOARDS OF SUPERVISORS—Contracts—Member May Not be Interested in Contract with School Board—Applicable to Contract in Force Before Qualifies as Member. (100)
Public Officers—Member of Board of Supervisors—May Not be Interested in Contract with School Board. (100)

September 22, 1959

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

This is in response to your letters of August 27, and September 8, 1959. Your letter of August 27 reads as follows:

"Several years ago a local oil and gasoline distributor made a contract with the Nelson County School Board to supply gas and oil for a term of years to the school board. This contract still has a year or so before it terminates.

"The same oil distributor has been nominated for supervisor of Nelson County, and in all probability will begin his duties as such on January 1st, 1960.

"My question is whether or not Section 15-504 or Section 15-381, will prohibit this supervisor when he takes office January 1st, 1960, from completing the performance of his contract with the school board which was made about 4 years before he will take office as supervisor."

I understand that Nelson County has adopted the County Board form of government, pursuant to the provisions of Article 5, Chapter 12, Title 15 of the Code, Section 15-504 is contained in Chapter 16 of Title 15, which chapter deals with county officers generally. Inasmuch as § 15-381 is contained in Article 5, it is applicable in this matter, and reads as follows:

"No member of the board of county supervisors or other officer or employee of the county, or person receiving a salary or compensation
from funds appropriated by the county, shall be interested directly or indirectly in any contract to which the county is a party, either as principal, surety or otherwise; nor shall any such officer or employee or his partner, agent, servant or employee or the firm of which he is a member purchase from or sell to the county any real or personal property, nor shall he be financially interested directly or indirectly in any work or service to be performed for the county or in its behalf. Any contract made in violation of any of these provisions shall be void. The amount embraced by any such contract, the value of anything so purchased or sold, and the amount of any claim for any such work or service shall never be paid; or, if paid, may be recovered, with interest, by the county, by action or motion, within two years from the time of payment."

Any contract made in violation of § 15-381 is void. The factual situation presented by your letter is that one of the candidates for the board of supervisors has a contract with the Nelson County School Board to furnish said Board all gasoline, motor oil and grease needed by the Board in the operation of the public schools. This contract became effective August 1, 1955, and extends to August 1, 1960, and, should this candidate be elected and qualify, the question presented is whether this candidate could continue to furnish these supplies under the terms of the contract.

I am of the opinion, despite the fact the contract in question was executed prior to the time this candidate—in the event he should be elected and qualifies—will become a member of the board of supervisors, that transactions between him and the school board after the date he assumes office would be in violation of § 15-381. The statute provides that "no member of the board of county supervisors * * * shall be interested directly or indirectly in any contract to which the county is a party * * *".

Usually statutes of this nature provide that no such officer shall become interested in a contract of this type, and the cases upon this subject relate generally to such statutes. The statute here provides that no member of the board shall be interested in such contracts.

*Commonwealth ex rel Graham, District Attorney v. DeCamp,* (Pa.) 35 Atlantic, 601, is the only case I have been able to find that seems to be in point. In that case an electric power company entered into a contract with the city of Philadelphia to furnish the city with electric light. Subsequently, and during the life of the contract, an official and stockholder of the power company was elected and assumed the office of a member of the city council. Ouster proceedings were brought against the councilman alleging that he was interested in a contract with the city in violation of a statute providing for the removal of a councilman who was interested in contracts with the city. The court stated that when the official of the power company entered upon the discharge of his duties as councilman he was interested, as an officer and stockholder of the company, in the contract—that the illegal relation forbidden by the statute began the moment he assumed to act as councilman, and sustained a lower court decision removing the councilman from office.

Apparently it was the intent of the General Assembly, by enacting §§ 15-301, 15-333 and 15-381 of the Code relating to counties that adopt a form of government provided in Chapters 11 and 12, Title 15 of the Code, to declare any contract void in which a member of the board or other officer is interested, despite the fact that the contract was made in good faith prior to the individual becoming an officer.
REPORT OF THE ATTORNEY GENERAL

BOARD OF SUPERVISORS—County Finance Boards—Short-Term Investments by—Liability of Treasurer. (90)

Honorable Colin C. MacPherson
Treasurer, Arlington County

September 17, 1959

This is in reply to your letter of September 10, 1959, which reads as follows:

"The Arlington County Finance Board is exploring the idea of short-term investments of substantial amounts of County General Fund and School Operating Fund monies, as distinguished from idle bond money. These fund balances are at a high level at the present time, and therefore this would seem to be the appropriate time for making such investments, pending the need for these funds.

"The proposal is to invest this money in short-term government securities rather than putting it in banks on time deposits, in order to secure a greater yield.

"The question has arisen as to the legal authority to make such investments, and it is in this regard that I respectfully request your opinion. More specifically, I would like to have your opinion as to the following questions:

"1. Is there authority for the local finance board to authorize such investment?

"2. If authority is lacking, may the local Treasurer make such investments under Section 2-298 of the Code?

"3. If such investments may be made, is it necessary or advisable that they be ratified or recommended by resolution or otherwise from the local County Board or School Board?

"4. If such investments are made, under what liabilities would the local Treasurer be placed?"

With regard to your first question dealing with the authority of the County Finance Board to authorize investments in short-term government securities, I am of the opinion that no specific statutory authority exists. However, Article 2 of Chapter 20 of Title 58, which spells out the duties of the county treasurer and of the county finance board, creates a relationship of joint responsibility for the deposit of county funds. Section 58-939 provides that all money received by the treasurer for the account of the Commonwealth or of the county, with certain exceptions, shall be deposited in an authorized bank or banks. Section 58-943 prescribes that such depository or depositories shall be selected by the treasurer and approved by the county finance board, and § 58-943.2 vests in the county finance board the power to authorize the treasurer to place "idle" county or district funds upon time deposit in such legal depositories. I feel that it would be advisable for the County Treasurer to first obtain authorization from the County Finance Board before investing any general fund or school operating fund moneys in short-term government securities pursuant to the authority contained in § 2-298 of the Code.

The latter section of the Code, as amended, is the subject of your second question, and reads as follows:

"§ 2-298.—The Commonwealth, all public officers, municipal corporations, political subdivisions and all public bodies of the Commonwealth may properly and legally invest any and all moneys or other funds belonging to them or within their control other than sinking funds in securities that are legal investments for fiduciaries under the provisions
REPORT OF THE ATTORNEY GENERAL

of clauses (1), (2), (3), (4), (5) and (24) of § 26-40 of the Code of Virginia, as amended, but this section shall not apply to retirement funds to be invested pursuant to § 51-76."

This office had occasion to render an opinion on the question of whether the county treasurer may make such investments under the provisions of this section to the Honorable James E. Durant, Treasurer of the City of Falls Church, on November 23, 1956. I am enclosing a copy of this opinion which is published in the Report of the Attorney General, 1956-57, at page 205. I fully concur with this opinion, which leads me to answer your second question in the affirmative.

As to your third question, I am of the opinion that it is certainly advisable that the County Treasurer be authorized to make such investments by the County Board of Supervisors where general fund moneys are to be used for this purpose, and that the County School Board be requested to authorize similar investment of school operating fund money. This action may be accomplished by the adoption of an appropriate resolution by each of these bodies.

In answer to your fourth question, assuming that the appropriate resolutions mentioned above have been adopted, I am of the opinion that the County Treasurer would not be held liable for any loss of general fund or school operating fund moneys incurred by reason of depreciation in value of the short-term government securities purchased by the Treasurer. In the case of deposits covered by § 58-938, et seq., the General Assembly, under § 58-952, specifically relieves the county treasurer from liability of any loss of public money. I construe the language of § 2-298 to have the same effect where investments are made pursuant thereto.

BOARD OF SUPERVISORS—Decision of Question Submitted—Majority of Members Present and Voting Necessary to Determine. (8)

July 9, 1959

HONORABLE BYRUM P. GOAD
Commonwealth’s Attorney for Carroll County

This is in reply to your letter of July 7, 1959, in which you incorporated copy of the minutes pertinent to three separate resolutions of the Board of Supervisors of Carroll County, which are as follows:

"Upon motion of C. Clayton Vernon and duly seconded by J. Arba Vass, that the applications for loans from the Literary Fund of Virginia, in the amounts of $135,000.00 for Mt. Bethel Elementary School, and $135,000.00 for the Lambsburg Elementary School this day presented to the Board of Supervisors of Carroll County by the School Board of Carroll County be approved."

"A vote was called for by the Chairman of the Board of Supervisors, which vote resulted as follows:

"Two of the members voted for the order, one voted against and two of the members abstained from voting."

"Upon motion duly seconded and carried that the application for a loan from the Literary Fund of Virginia in the sum of $135,000.00 for Lambsburg Elementary School, this day presented to the Board of Supervisors of Carroll County by the School Board of Carroll County be approved: .
"Whereupon, C. Clayton Vernon, Supervisor from Fancy Gap Magisterial District called for a recorded vote, which resulted as follows:

"C. Clayton Vernon, aye
"J. Arba Vass, aye
"Asa O. Quesinberry, abstaining from voting
"Robert E. Branscome, abstaining from voting
"Harvey H. Huneycutt, abstaining from voting"

"Whereas, the Board of Supervisors of Carroll County are not advised as to whether or not the votes taken and recorded on the application for loans from the State Literary Fund for the construction of elementary school buildings at Mt. Bethel and Lambsburg in the amount of $135,000.00 each, prohibit the reconsideration thereof on the motion of any member of the Board and if so are the votes therein taken and recorded binding upon the said Board of Supervisors of Carroll County.

"Now, therefore upon motion duly seconded and carried the foregoing questions are submitted to the Attorney for the Commonwealth of Carroll County for his advice thereon on or before the third day of August, 1959.

"The Clerk of this Board is directed to transmit a copy of this resolution and the orders entered on the foregoing question to said Attorney for Commonwealth."

The vote upon the first order relating to Literary Fund loans for Mt. Bethel Elementary School and Lambsburg Elementary School discloses that there were five members present at the meeting and that two of the members voted in favor of authorizing the loans and one member voted in the negative. Two of the members abstained from voting. There is no question as to a quorum being present, since the Board consists of five members.

Section 15-245 of the Code contains this language.

"All questions submitted to the board for decision shall be determined by viva voce vote of a majority of the supervisors voting on any such question; * * *."
BOARD OF SUPERVISORS—Employment of Wife of Member of Board—Interpretation of § 15-504. (7)  

HONORABLE W. CARY CRISMOND  
Clerk, Circuit Court of Spotsylvania County  

This is in reply to your letter of July 8th, which reads as follows:  

"I have been instructed by the Board of Supervisors to write to you and ask the ruling on the following question:  

"1. Whether the wife of a member of the Board of Supervisors can be employed and paid by the Board of Supervisors for work indexing certain records in the Circuit Court Clerk's Office.  

"I might add that this was special work ordered done by the Judge of this Circuit and that there was no request to the Compensation Board that the costs be paid for the work by the Clerk."

Section 15-504 of the Code prohibits a member of the Board of Supervisors from being interested, directly or indirectly, in any contract, or in the profits of any contract, fee, commission, premium or profit therefrom paid, in whole or in part, by the county. This section does not specifically prohibit the employment by the county of the wife of a member of the Board of Supervisors. The question to be resolved in any such case is whether or not the member of the Board of Supervisors in such a case will directly or indirectly be interested in the contract and the compensation being paid therefor.

BOARD OF SUPERVISORS—Expenditures—Must have Specific Appropriation Despite Levy of Special Tax Limited to Capital Outlay and Debt Service. (84)  

HONORABLE PAUL HOUN SHELL  
Division Superintendent of Schools  

This is in reply to your letter of September 2, 1959, which reads as follows:  

"I have a question in my mind about the handling of the proceeds from a 30 cent levy for Capital Outlay and Debt Service in our county.  

"Our Board of Supervisors put on this levy as a separate tax specifically for this purpose. Our treasurer and I do not think that this money has to be appropriated again by the Board of Supervisors in order to pay literary loan and interest payments or for the payment of other capital outlay approved by the Board of Supervisors. As we read the statute, any levy set by the Board of Supervisors for a specific purpose, in a special account for that purpose, need not be appropriated again by the Supervisors."

The provisions of Sections 15-575 and 15-577 of the Code, as amended at the Extra Session of the General Assembly, 1959, in my opinion, require the board of supervisors to make an appropriation in this case. The fact that there was a specific levy for Capital Outlay and Debt Service does not relieve the board of supervisors of the requirements of these Code sections.

In Section 58-921, as amended at the special session of 1959, it is provided that "copies of all appropriations, and ordinances and resolutions appropriating funds by the governing body, shall be delivered to the treasurer by the clerk of the
governing body.” This section provides that no county treasurer shall refuse to pay any warrant legally drawn upon him when there shall be appropriated money in the treasury belonging to the fund drawn upon available and sufficient to pay the amount included in the warrant. The treasurer, for his protection, should decline to make disbursements unless he has been furnished a copy of the appropriation ordinance.

You will recall that Honorable J. Gordon Bennett, Auditor of Public Accounts, under date of June 15, 1959, issued a memorandum directed to the county treasurers and other county officials, including the Division Superintendents of schools, in which he made the statement that appropriations would have to be made for all county funds. Mr. Bennett discussed the contents of this memorandum with this office prior to its release and we were in accord with his interpretation of the statutes.

Your attention is directed to Section 58-839 of the Code, as amended at the recent special session. This section provides that:

“The making of a general county levy or the imposition of other taxes or the collection of such levy or taxes shall not constitute an appropriation nor an obligation or duty to appropriate any funds by the board of supervisors, or other governing body of any county for any purpose, expenditure or contemplated expenditure. The laying or making of a levy in an amount sufficient to cover or pay all estimated and contemplated expenditures for the fiscal year shall not be construed as imposing any obligation or duty on the board of supervisors or other governing body to appropriate any amount whatsoever. No part of the funds raised by the general county levies or taxes shall be considered available, allocated or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the board of supervisors or other governing body to appropriate any funds raised by general county levies or taxes except to pay the principal and interest on bonds and other legal obligations of the county or district and to pay obligations of the county or its agencies and departments arising under contracts executed or approved by the board of supervisors or other governing body, unless otherwise specifically provided by statute. Any funds collected and not expended in any fiscal year shall be carried over to the succeeding fiscal years and shall be available for appropriation for any governmental purposes in those years.”

This section clearly requires that an appropriation is required prior to the expenditure of any funds raised by taxes, and it places a mandatory duty upon the governing body to appropriate funds to pay contractual obligations of the county.

BOARD OF SUPERVISORS—How Vacancy Filled when Member Dies in Office—Arlington County. (220)

HONORABLE WILLIAM L. WINSTON
Member, House of Delegates

You advise that a member of the County Board of Arlington County, who was elected in the November 1959 election, and who assumed office on January 1,
1960, is deceased, and inquire as to the manner in which the vacancy in such office shall be filled.

The county of Arlington, we understand, has adopted the county manager form of government provided for in Chapter 167 of the Acts of 1930, at page 451. Section 2773(k) of the Acts of 1930 provided that "unless otherwise provided in the election hereinafter provided for, the members of the board shall be elected from the county at large and not by districts."

Section 2773(n) contained a provision presenting to the voters three questions. Question number three gave the voters the right to choose between electing the board members at large or by districts. This Act does not contain any provision with respect to the filling of vacancies and, therefore, at that time, the provisions of Section 24-145 of the Code, with respect to the filling of vacancies, were applicable. See Smith v. Kelley, 162 Va. 645. This section was then Section 136 of the 1919 Code.

The 1938 session of the General Assembly, by Chapter 372, amended the Code of Virginia with respect to the special county governments that could be adopted under the Act of 1930 so as to provide that upon a favorable referendum authorizing the same the members of the boards should be elected, and vacancies filled, in accordance with the provisions of Section 2773(f) 1 (b) and (c). The two latter paragraphs of said section are as follows:

“(b) At the general election in November, nineteen hundred and thirty-nine, the members of the county board of such county shall be elected to hold office for the following terms: the two members of the said board receiving the highest and the next highest number of votes in the said election shall each be elected for a term of four years, the member receiving the third highest number of votes shall be elected for a term of three years, the member receiving the fourth highest number of votes shall be elected for a term of two years, and the member receiving the fifth highest number of votes shall be elected for a term of one year; each of such members shall take office on the first day of January after his election and shall hold office until his successor is elected and qualified. Thereafter at each regular November election there shall be elected one or more members of the county board to succeed the member or members whose terms expire on or before the first day of January next succeeding such election; the members so elected shall be elected for terms of four years each and shall take office on the first day of January next succeeding their election.

“(c) When any vacancy shall occur in the membership of the county board, the judge of the circuit court of the county shall, if the term of the office wherein the vacancy exists shall continue for one year or more after the next succeeding regular November election, issue a writ of election to fill such vacancy, the said election to be held at the next regular November election; the member so elected shall hold office for the unexpired term. The said judge may make a temporary appointment to fill such vacancy until the same is filled by election as herein provided, or in the event no election be required to fill such vacancy, then until the expiration of the term of such office.”

The 1938 Act referred to above and designated in the old Code as Section 2773 (f) 1 was subsequently amended in 1946 by Chapter 340, at page 566; in 1947, extra session, by Chapter 41, at page 91; in 1952 by Chapter 591, at page 1035; in 1955 by Chapter 151, at page 147, and in 1958 by Chapter 207, at page 263. Neither the amendments of 1946 nor of 1947 in any way amended or changed the provisions of (c) found in the Acts of 1938 and quoted above. Therefore, whether a referendum was held under the Acts of 1946 and 1947 is not material to a resolution of the question presented, because neither of these Acts amended subsection (c).
Subsection (c) in the Act of 1938, we understand was adopted by the people pursuant to a referendum held in November, 1938. This subsection (c) became, without material change, paragraph (d) of Section 15-351 of the Code of 1950.

The 1952 Act amending Section 15-351 of the Code, was an enabling act which gave counties operating under the county manager form of government a different method for the election of members of the county board and the filling of vacancies thereon, than the method which was established in the 1938 Act. However, this method was subject to a referendum and it is our understanding that in Arlington a referendum was had and defeated. With specific reference to that portion of the 1938 Act, which was adopted by the county of Arlington relating to the filling of vacancies, the last sentence of subsection (c) quoted above was deleted in the enabling act of 1952 and it has remained deleted in the subsequent amendments of 1954 and 1958 which were also enabling acts. This, however, is not important to a conclusion in this matter, since we understand there has not been a favorable referendum under the 1952, 1954 or 1958 Acts.

Under subsection (c) as quoted above, and which we understand was adopted by the voters of the county of Arlington at the referendum held pursuant to Chapter 372 of the Acts of 1938, it will be noted that in case of a vacancy on the county board the court, if the vacancy extends for a sufficient length of time, should call a special election in the succeeding November election to fill the vacancy, and in the meantime may fill such vacancy by an interim appointment until such election is held and the person elected has qualified.

The amendments of 1952, and subsequent amendments which had the effect of deleting from subsection (c) the terminal sentence with regard to interim appointments, were not to become effective in any county until and unless there was a favorable referendum with respect to the matter. Inasmuch as there has been no favorable referendum putting into effect the alternate provision with respect to vacancies, it is our opinion that the provisions of subsection (c), as quoted above, remain in effect and applicable to the county of Arlington, and that the judge of the circuit court of that county has the power to make an interim appointment to the board to fill the vacancy, which appointment would expire when a successor is elected in the November 1960 election and such person has qualified for office.

BOARD OF SUPERVISORS—May Change Name of Street Not Part of State Highway System—Subdivision. (62)

HONORABLE LEONARD F. JONES
Commonwealth's Attorney for Campbell County

August 20, 1959

This is in reply to your letter of August 18, 1959, which reads, in part, as follows:

“A petition has been filed with the Board of Supervisor of Campbell County requesting the Board to change the name of a street in a subdivision. The change is opposed by other land owners in the subdivision and by the subdivider. The street name is shown on a plat which was recorded January 5, 1953 as part of a deed. This was prior to the enactment of a subdivision ordinance by the county.

“Before considering this matter, the Board would like to know if it has the authority to change the name of the street.”
I am of the opinion that under Section 15-777.1 of the Code, the Board of Supervisors has authority to change the name of a street. You will note that under this section the Board would not have authority to designate the names of any streets forming a part of the State Highway System since this power is conferred upon the State Highway Commission under Section 33-12(4) of the Code. Under this latter section the Board would be prohibited from changing the name of any street or road which has been given a name by an Act of the General Assembly.

BOARD OF SUPERVISORS—May Request U. S. District Engineer to Dredge Channel—No Financial Commitment. (135)

October 21, 1959

HONORABLE WILLIAM CLARK COULBOURN
Commonwealth's Attorney for Mathews County

This is in reply to your letter of October 19, 1959, which reads, in part, as follows:

"Queen's Creek, in Mathews County, is a tidal stream of considerable length which empties into Hill's Bay in the vicinity of Gwynns Island. For a long time the mouth of Queen's Creek has been obstructed to such an extent as not to be navigable, although the Creek itself is navigable. Recently a number of residents of Mathews County who live in the neighborhood of Queen's Creek have formed a voluntary association, called the Queen's Creek Improvement Association, with the avowed purpose of raising sufficient funds by private subscription to pay for dredging a navigable channel at the mouth of the Creek.

"The County of Mathews is not at this time interested in the project and the Board of Supervisors has taken no action under Section 62-117.1 of the Code of Virginia to determine that the project will accrue to the general or special benefit of the County.

"The Queen's Creek Improvement Association has asked the Board of Supervisors to adopt a resolution requesting the United States District Engineer to grant permission to the Association to undertake the proposed dredging project. The reason for the Association's request seems to be that a resolution from the governing body of the County will carry more weight with the District Engineer than a request from the Association itself."

You have requested my opinion as to whether or not such action by the board of supervisors would be in violation of Section 185 of the Constitution, which provides that:

"Neither the credit of the State, nor of any county, city, or town, shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation, nor shall the State, or any county, city, or town subscribe to or become interested in the stock or obligations of any company, association, or corporation, for the purpose of aiding in the construction or maintenance of its work; • • • ."

In my opinion the proposed action by the Board is not prohibited by the Constitution. Our Supreme Court has construed Section 185 of the Constitution to mean that it does not prohibit the board of supervisors from entering into

If, as you seem to suggest, the county would not benefit from the proposed project, I fail to see how a resolution of the board merely requesting the United States District Engineer to grant permission to a privately organized group to engage in the project could be considered as a financial commitment by the board.

BOARD OF SUPERVISORS—Meetings—Procedure—Motions and Voting Thereon. (183)

HONORABLE BERTRAM F. DOODSON
Member, Campbell County Board of Supervisors

This is in reply to your letter of December 9, 1959, which reads as follows:

"A question has arisen as to the legality of a motion being made by member of the Board of Supervisors on a subject. The motion was not seconded, however, one person voted against the motion, the Chairman of the Board voted for the motion, the other members refused to vote, the Chairman declared the motion was carried."

Section 15-245 of the Code is the applicable section. The first sentence of this section reads as follows:

"All questions submitted to the board for decision shall be determined by viva voce vote of a majority of the supervisors voting on any such question; but in any case in which there shall be a tie vote of the board upon any question when all the members are not present, the question shall be passed by till the first meeting at which all the members are present, when it shall again be voted upon; in any case in which there shall be a tie vote on any question when all the members of the board are present, the clerk shall record the vote and immediately notify the commissioner in chancery, designated by the court to give the casting vote in case of a tie, if that be practicable, and request his presence at the present meeting of the board; but if that be not practicable then the board may adjourn to a day fixed in the minutes of the board, or in case of a failure to agree on a day, to a day fixed by the clerk and entered by him on the minutes. • •"

It will be noted that this section provides that "all questions submitted to the board for decision shall be determined by viva voce vote of a majority of the supervisors voting on any such question; • •.""1

In the case which you have presented the motion was not seconded; one member voted against the motion; one member voted for the motion and the other members abstained from voting.

With respect to the first point, I am of the opinion that a motion upon any question before the board of supervisors made by a member of the board of supervisors, does not require a second in order for the question to be called for a vote. This conclusion is in accord with a previous opinion of this office published in Report of Attorney General for 1956-57, at page 35.

In the present case there was a tie vote and, therefore, the motion was not carried. Under the Code section to which I have referred, the clerk of the board could have notified the tie-breaker appointed under Section 15-240 of the Code and could have requested his presence at the meeting for the purpose of breaking
the tie. This apparently was not done and, in that event, the board could have adjourned to a day fixed by the minutes of the board, or in case of a failure to agree on a day, to a day fixed by the clerk and entered by him on the minute books. In my opinion the clerk may now fix the day for a meeting for the purpose of breaking the tie. The tie-breaker, after receiving this notice, should attend and be fully advised as provided in this Code section and either cast his vote or ask for an adjournment for a period not to exceed thirty days in order to give him an opportunity to consider how to vote.

The members who abstain from voting are not to be considered as having voted for or against the motion.

It is clear from this statute that the motion was not carried since a majority of the members voting is required and for failure to obtain a majority the tie-breaker should be notified by the clerk to appear on a day to be fixed by him so that he can meet with the board and vote upon the question.

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BOARD OF SUPERVISORS—No Authority to Acquire Land to be Leased for Recreational Purposes. (387)

HONORABLE T. STOKEY COLEMAN
Commonwealth's Attorney for Spotsylvania County

June 16, 1960

This is in reply to your letter of June 15, which reads as follows:

"The Board of Supervisors of Spotsylvania County, Virginia asked me to request your opinion on the following situation:

"The Board of Supervisors is contemplating purchasing 20 acres of land adjacent to the property of the County high school, with the purpose of leasing it for a term of years to a private organization which proposes to operate it for athletic purposes and events, with the possible addition of certain recreational facilities. The rent paid to the county by the private organization would be based on a certain per centage, not exceeding six per cent of the initial value to the county. The private organization would make a charge to other organizations for the use of their grounds. The lease would be for a period of years and would carry a provision that in the event of its termination, according to the terms thereof or otherwise, all improvements and facilities created thereon would become the property of the county.

"The supervision of the premises will be at the direction of the private organization and will be offered for use by rental to those who apply on the first come, first served basis. This means that the facilities of the property would be open to all people, under the supervision and direction of the local organization. This raises two questions: First, whether or not the Board of Supervisors may acquire the property in the first instance, under Section 15-688 of the Code, and second, having so acquired the property if the law will permit them to lease it to a private organization on the terms stated."

Section 15-688 authorizes the governing body of a county to acquire as much as twenty acres of land, in addition to the two acres mentioned in Section 15-686, to be used for county purposes.
The establishment and operation of a system of public recreation and playgrounds is authorized by Sections 15-697 through 15-700. Recreational facilities established pursuant to these sections would be within the scope of "county purposes" as contemplated by that term in Section 15-688. The provisions of Sections 15-697 through 15-700, in my opinion, contain the only method by which a county may establish and operate recreational facilities, with the exception of swimming pools. A county is expressly authorized by Section 15-691.1 to lease county-owned property to private organizations for the purpose of operating a swimming pool, but there is no comparable provision with respect to recreational facilities generally.

Upon consideration of these provisions, I am of opinion a board of supervisors does not have authority to enter into an arrangement such as you have stated. In my opinion, the authority of a county in this respect is limited to the procedure established by Sections 15-697 through 15-700.

BOARD OF SUPERVISORS—No Authority to Expend Funds to Publish Names and Salaries of Employees. (345)

May 11, 1960

HONORABLE E. A. CHRISTIAN
Member, Board of Supervisors for Louisa County

This is in reply to your letter of May 9, which reads as follows:

"Please advise me if there is anything in the Code of Virginia forbidding the publishing of the salaries paid to public school teachers by the governing body of a county?"

"Several of the members of the Board of Supervisors including myself desire to publish the names of the teachers of the Louisa County schools and the salaries paid them in our county newspaper for the information of the public but have been told that we have no authority to do so therefore I would like to have a ruling by you on this matter."

I am not aware of any statute prohibiting the publication of such information. Section 22-53 of the Code provides that the minutes of a school board shall be open to the inspection of every citizen of the county. I assume that this information is recorded in the minute book of the school board.

Section 15-248 contains a similar provision with respect to the minutes of meetings of a board of supervisors.

If your question pertains to the authority of a board of supervisors to expend public funds of the county for the purpose of publishing the names and salaries of the public school teachers, in my opinion, no such authority exists.

Section 15-249 of the Code authorizes a board of supervisors to raise by levy "such sums as may be necessary to defray the county charges and expenses and all necessary charges incident to or arising from the execution of their lawful authority." Under the provisions of Section 15-577 of the Code, a board of supervisors is directed to publish "only a brief synopsis of the budget." This would not authorize the publication at public expense of each separate item of proposed expenditures. It follows that since the board is thus restricted in the information pertaining to the budget it may publish at the expense of the public fund, it cannot be assumed, in the absence of express statutory authority, to have the power, after a budget has been adopted, to expend public funds for the purpose of publishing the amount of salary being paid to the employees of the county.
REPORT OF THE ATTORNEY GENERAL

BOARD OF SUPERVISORS—No Authority—To Guarantee Payment for Federal Surplus Properties in Civil Defense Program. (379)

HONORABLE ERNEST W. GOODRICH
Commonwealth's Attorney for Surry County

I am in receipt of your letter of May 26, 1960, in which you state that the Civil Defense Coordinator of Surry County has presented to the Board of Supervisors of Surry County the following resolution which officials of the State Civil Defense Program are asking the board of supervisors to approve:

"BE IT RESOLVED by the Board of Supervisors of Surry County, Virginia, that this Board guarantees the payment of all costs and expenses which may be incurred in the delivery or procurement of Federal Surplus Properties which may be obtained for the Civil Defense Program in Surry County, Virginia.

BE IT FURTHER RESOLVED that Michael Zazzaretti, of Surry County, Virginia, be and he hereby is designated to apply for and receive said properties."

From your communication, it appears that you have advised the board of supervisors that it has no authority to adopt the above quoted resolution, and you request an opinion upon the validity of your position.

The laws of the Commonwealth of Virginia relating to civil defense are embodied in Chapter 3 of Title 44 of the Virginia Code, Section 44-141 et seq., Code of Virginia (1950) as amended. Section 44-145.3(a) and (b) empower the various political subdivisions of the Commonwealth—acting with the consent of the Governor through their respective executive officers of governing bodies—to accept, and appoint an official to receive, services, equipment, supplies, materials or funds offered "by way of gift, grant or loan, for purposes of civil defense" by the federal government, any agency or officer thereof, or by any person, firm or corporation. Moreover, Sections 44-146 and 44-146.1 of the Virginia Code authorize the governing bodies of the individual counties to appropriate funds for expenditure by any local or regional council of defense, for local or regional defense activities and for the payment, in part, of the purchase price of supplies and materials to be used in civil defense programs.

However, I have found no statute which purports to authorize any county unilaterally to guarantee the payment of costs and expenses which may thereafter be incurred in the procurement or delivery of federal surplus properties or any other supplies or materials which may be obtained for the local civil defense program carried on in the county. I, therefore, concur in your view that the Board of Supervisors of Surry County is not authorized to adopt the resolution under consideration.

BOARD OF SUPERVISORS—No Authority to Pay Rent on Office for Federal Agency. (391)

HONORABLE REGINALD H. PETTUS
Commonwealth's Attorney for Charlotte County

This is in reply to your letter of June 13, in which you present the following question:
"Is it legal for the county to pay the rent on a building to be used to house a federal agency? It is the A.S.C. office."

In response to my request for additional information you state that the county government has no connection with this project—that it is a federal agency that handles the allotment program under federal laws.

I enclose an opinion rendered by this office on May 16, 1938, in which it was held that a county could appropriate money for the payment of rent, heat and lights for the local office of the Works Progress Administration. This conclusion was justified on the ground that the projects of that Administration were undertaken under the joint sponsorship of the counties and the Works Progress Administration.

As I construe your second letter, this is solely a federal project. If my assumption is correct, I am of opinion the board of supervisors does not have authority to pay the rent in question out of the public funds of the county.

The opinion referred to is published in the Report of this office for 1937-38, at page 39.

BOARD OF SUPERVISORS—No Authority to Provide Additional Clerical Help for Clerk. (405)

Honorable John H. Powell
Clerk of Circuit Court of Nansemond County

June 29, 1960

This is in reply to your letter of June 20 in which you call attention to the many duties falling upon you as clerk of the board of supervisors and requests my advice as to whether the board of supervisors has authority to appropriate funds for the purpose of providing additional clerical help.

I am not aware of any statute that authorizes such an appropriation. Of course, the board may proceed under Article 8, Chapter 16, Title 15 of the Code.

We discussed this matter with Honorable J. Gordon Bennett, Auditor of Public Accounts, and he stated that quite a number of counties have established the office of County Executive Secretary for the purpose of meeting situations such as you have suggested. Mr. Bennett stated that he would be glad to confer with you and your board at his office.

BOARD OF SUPERVISORS—Payment of Pension—Retired School Superintendent. (178)

Honorable George R. Heatwole
Chairman, Board of Supervisors of Rockingham County

December 11, 1959

This is in reply to your letter of December 5, 1959, which reads as follows:

"A person who for many years served as Superintendent of Schools for Rockingham County retired some years ago. Upon his retirement the Rockingham County School Board voted to pay him a pension of $75.00 per month, in addition to the pension he would receive from the State, for his long and dedicated services for the schools of Rockingham County at a very small salary. This sum of money has been included in the budget for the Rockingham County School Board each year and approved by the Rockingham County Board of Supervisors."
"Several people have contacted me inquiring as to whether we have the legal right to pay this pension in addition to the pension paid by the State. I do not feel that a formal legal opinion by the Attorney General is necessary or desirable, but would appreciate a letter informing me as to whether we do have the right to pay this pension."

As you no doubt know, the various localities may, if they desire, participate in the Virginia Supplemental Retirement System under the provisions of Article 4, Chapter 3.2, Title 51 of the Code. The only other provisions as to counties are those contained in the various acts of the General Assembly which are continued under the provisions of Section 51-114 of the Code. I do not believe that any of these acts would apply to your county. However, you might check them in order to see if your county is included in any of the classifications. You are also referred to Article 3, Chapter 4 of Title 51 of the Code—Sections 51-127.1, et seq.

Unless your county qualifies under one of these statutes, I am of the opinion your board of supervisors does not have authority to make an appropriation for the pension in question.

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BOARD OF SUPERVISORS—Protection of County Funds—May Purchase Theft Insurance. (180)

December 11, 1959

HONORABLE JAS. M. SETTLE
Clerk of Rappahannock County

This is in reply to your letter of December 10, 1959, which reads as follows:

"The Chairman of the Board of Supervisors of Rappahannock County has requested me to write you for a ruling, as to whether or not Boards of Supervisors may provide for and pay from County Funds, bond premiums for Burglary Insurance to protect funds collected by Court Clerks, Treasurers, Commissioners of Revenue or other elected county Officials."

Section 15-9 of the Code of Virginia is applicable. This section reads as follows:

"The board of supervisors of any county may represent the county and have the care of the county property and the management of the business and concerns of the county, in all cases in which no other provisions shall be made and, when necessary, may employ counsel to assist the attorney for the Commonwealth in any suit against the county or in any matter affecting county property when the board is of the opinion that such counsel is needed."

I am of the opinion that a county board of supervisors is authorized under this Code section to make appropriations from the general county fund for the purpose of purchasing theft insurance for the protection of county funds in the custody of the officials mentioned in your letter.

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BOARD OF SUPERVISORS—Public Contracts—Member of Board May Not be Interested in—Insurance Policies. (164)

November 25, 1959

HONORABLE LEONARD F. JONES
Commonwealth's Attorney of Campbell County

This is in reply to your letter of November 24, 1959, which reads as follows:
REPORT OF THE ATTORNEY GENERAL

"The County School Board of Campbell County has insurance with an agent who will take office as a member of the Board of Supervisors of Campbell County on January 1, 1960.

'I would appreciate your opinion on the following questions:

"(1) Will it be necessary to cancel the insurance in effect with this agent when he takes office, and if not

"(2) Can the school board legally renew a policy with him which expires December 1, 1959?

"Campbell County has not adopted any of the optional forms of government."

Under the provisions of Section 15-504 of the Code no member of the board of supervisors may become interested in any contract or in the profits of any contracts made with the county. This section prohibits a member of the board of supervisors from writing insurance upon property belonging to the school board of the county or any other property that the county owns.

With respect to those policies which were written prior to the time this person was elected to the board of supervisors and which have an expiration date during the term of his service, I am of the opinion that these policies may continue in effect until the expiration date, provided the total premium on said policies has been paid by the county prior to the time such person becomes a member of the board.

With respect to the policy which expires on December 1, 1959, I realize that the question is not entirely free from doubt. If the premium upon the policy is paid prior to the time the member elect assumes office on January 1, 1960, under a strict interpretation of the statute it would seem that there would be no violation.

BOARD OF SUPERVISORS—Residence of Candidate for Member—Intent to Remain Resident of District. (46)
Elections—Candidates—Must be Resident of District. (46)

HONORABLE FRANK NAT WATKINS
Commonwealth's Attorney for Prince Edward County

This is in reply to your letter of August 4, 1959, to which you attached a copy of an opinion rendered by you concerning the eligibility of Mr. Edward Carter to be a candidate for and hold the office of member of the Board of Supervisors from Hampden District in your county.

The facts as stated by you are as follows:

"Mr. Carter has resided in Hampden District all of his life except for the past few years, where he has owned different homes in the town of Farmville, but retaining his farm and residence in Hampden District where he has always voted."

You expressed the opinion that under the facts Mr. Carter was not disqualified from being a candidate for member of the Board of Supervisors from the district mentioned. You rely upon a statement contained in the case of Williams v. Commonwealth, 116 Va. 272, 81 S. E. 61, which is as follows:

"The true test in cases of this kind seems to be this, that if a person leaves his original residence with intent never to return and adopts
another for a time however brief, his residence is lost in the first instance, but if in leaving his original residence he does so with intent to return, he continues to hold his original residence. The law appears further to be as related to the right to hold office in the first instance. That is, where a man has two places of living the question of his legal residence is to be determined largely where his right to hold office is involved by his intention."

A more recent case bearing on this subject is Dotson v. Commonwealth, 192 Va. 565. In that case the Court stated that a person's intention in a case such as this is a question of fact. Usually the person affected knows better than anyone else what he has in mind. In this case the Court made this statement:

"There is a presumption that a domicile once acquired subsists until a change is proved and the burden of proving the change is on the party alleging it."

The Court, in this case, also said:

"Every man is deemed to have a domicile somewhere. Before a domicile once established becomes lost or changed, a new domicile must be acquired by removal to a new locality with intent to remain there, and the old domicile must be abandoned without intent to return."

Under the facts as I understand them, I concur in your opinion in this matter. I enclose a copy of an opinion relating to this subject which we furnished to Honorable Kenneth M. Covington, Commonwealth's Attorney, Martinsville, Virginia, on the 22nd day of June, 1959.

BONDS—Deputies—Clerks, Treasurers and Commissioners of Revenue. (204)

January 11, 1960

Honorable Thomas H. James, Clerk
Circuit Court of Northampton County

This is in reply to your letter of December 30, 1959, in which you ask:

"Please advise me by what authority do the deputies to the Clerk of Court, deputies to the Treasurer and deputies of the Commissioner of the Revenue execute and acknowledge bonds? And to whom should the bonds be made payable, to the Commonwealth or their principals, and in what amounts?"

I assume that you have reference to execution and acknowledgement by deputy clerks, treasurers and commissioners of the revenue of fidelity bonds covering the performance of their duties.

There is no statutory requirement that a deputy commissioner of the revenue furnish a fidelity bond, nor is there any statutory requirement that a deputy clerk give a bond for the faithful discharge of his official duties, but the appointing commissioner of the revenue or clerk should require that such bond be furnished for his own protection, he being liable for the acts or omissions of his agent. Section 15-485 of the Code of Virginia, the general statute authorizing the appointment of deputies by county treasurers, commissioners of the revenue and clerks, among others, requires only that the appointed deputy, or deputies, "shall take and prescribe the oath," with no mention of bond.
However, § 58-918 of the Code provides that the county treasurer "may take from any deputy such bond with surety as he shall deem necessary for his indemnity," and § 15-485.1 requires that a deputy clerk of court appointed by the judge pursuant to that Code section "shall furnish bond in the same amount as is required of the clerk" whose duties he is appointed to perform.

As to whom such bonds should be made payable and the amounts thereof, it is obvious from a reading of § 58-918 of the Code that the bond of a deputy treasurer should be made payable to the treasurer in an amount which the treasurer "shall deem necessary for his indemnity." The bond of a deputy clerk of court appointed pursuant to the provisions of § 15-485.1 should be made payable to the Commonwealth of Virginia, as is required by § 49-12, in the same amount as the bond of the clerk.

With regard to the bonds of deputies appointed by commissioners of revenue and by clerks of court, the statutes are silent. Such bonds are not "required by law" within the purview of § 49-12, but, as a practical matter, should be required by the appointing officers for their own protection.

Sections 15-521 and 15-522, when read with § 15-485, indicate that it is advisable and customary for sheriffs, sergeants and other officers to require bonds of their deputies, and I am of the opinion that such bonds should be made payable to the Commonwealth of Virginia in an amount not less than that required by law of the principal.

BONDS—Issue by State Educational Institution—Treasury Board May Designate State Treasurer and Bank as Co-Paying Agents. (18)

HONORABLE E. B. PENDELETON, JR.
Treasurer of Virginia

This is in reply to your letter of July 14, 1959, in which you ask whether the Treasury Board of the Commonwealth may delegate to others authority to perform certain acts in connection with an issue of certain revenue bonds by the Medical College of Virginia.

You set out in your letter the following resolution which was adopted by the Treasury Board on April 14, 1959:

"On motion duly made and seconded, the following Resolution was unanimously adopted by the members of the Board who were present:

"WHEREAS, in accordance with the provisions of a certain Loan Agreement, dated as of February 1, 1957 and Amendatory Loan Agreements dated as of October 1, 1957, May 1, 1958 and January 2, 1959, by and between the Medical College of Virginia and the United States of America, the said Medical College of Virginia proposes to issue certain revenue bonds in the aggregate principal amount of $1,113,000, to be designated as 'Medical College of Virginia Dormitory Bonds of 1957', to finance the construction of a dormitory project pursuant to the provisions of Chapter 3 of Title 23 of the Code of Virginia, 23-14 through 23-30, and

"WHEREAS, 23-19, as amended, of the Code of Virginia, designates the Treasury Board as the issuing, sales and paying agent of such institution in such event, and

"WHEREAS, the Board is of the opinion that it should designate the Treasurer of the Commonwealth of Virginia and a commercial bank-
ing institution having its principal office in the Borough of Manhattan, City and State of New York, as co-paying agents or alternate paying agents in order to perform most efficiently the Board's duties as such paying agent and has been advised that such action is in conformity with the laws of the Commonwealth of Virginia.

"NOW, THEREFORE, BE IT"

"RESOLVED, by the Treasury Board of the Commonwealth of Virginia that the Resolution of the Board of Visitors of the Medical College of Virginia, adopted on April 10, 1959 and entitled Resolution authorizing $1,113,000 Medical College of Virginia Dormitory Bonds of 1957, annexed hereto and made a part hereof and designated as Exhibit A, be and the same is hereby approved, ratified and in all respects confirmed, and"

"FURTHER RESOLVED, that the Treasurer of the Commonwealth of Virginia and the Chase Manhattan Bank, having its principal office in the Borough of Manhattan, City and State of New York, be and they hereby are designated as co-paying agents or alternate paying agents for the payment of interest on and principal and redemption price of the Medical College of Virginia Dormitory Bonds of 1957; and"

"FURTHER RESOLVED, that the Resolution adopted by the Board of Visitors of the Medical College of Virginia on April 10, 1959, a copy of which is annexed hereto and made a part hereof and designated as Exhibit B, pursuant to which the President or Comptroller of the Medical College of Virginia were authorized to publish a notice of sale of said Medical College of Virginia Dormitory Bonds of 1957, and to accept bids for said bonds and award the said bonds to the United States of America, acting through the Housing and Home Finance Agency, at an interest rate of Two and three-quarters per centum (2-3/4%) per annum in the event that no other bid is received, which in the opinion of the President or the Comptroller is more advantageous to the Medical College of Virginia, be and the same hereby is approved, ratified and in all respects confirmed; and"

"FURTHER RESOLVED, that the President and the Comptroller and any and all other officers of the Medical College of Virginia, be and they hereby are authorized and directed to execute any and all papers and affix the seal of the Medical College of Virginia thereto and to do any and all acts necessary, desirable or proper in the authorization, issuance and sale of the Medical College of Virginia Dormitory Bonds of 1957."

It is my opinion that the Treasury Board of the Commonwealth has acted within its express and implied powers in adopting this resolution. The general powers conferred upon the Treasury Board by the General Assembly in Section 2-149.2, Code of Virginia, are not in any way limited by the provisions of Section 23-19, as amended. It is manifest that the General Assembly is and has been aware of the practice utilized by the Treasury Board of delegating to the State Treasurer the performance of its ministerial duties. Further, delegation to the President, Comptroller and other officers of the Medical College of Virginia of the authority to execute papers and affix the seal of the Medical College thereto is in conformity with this doctrine.

Of course, delegation of the authority to perform ministerial functions does not relieve the Treasury Board in any way of its responsibility and accountability for the acts performed pursuant to its direction.
REPORT OF THE ATTORNEY GENERAL

BONDS—Justices of Peace—Not Authorized to Accept Checks—Do so at Own Risk. (196)

December 18, 1959

Honorable J. Gordon Bennett
Auditor of Public Accounts

This is in reply to your letter of December 17, 1959, which reads as follows:

"Sections 19-106 and 19-107 of the Code of Virginia provide for the taking of cash deposits in lieu of recognizances with surety and the forms of receipts to be given by justices of the peace for cash bonds so taken. In connection with an examination being made of a county court, we have determined that the judge advised justices of the peace as follows with respect to the taking of bonds for appearance before his court:

"* * * All bonds, other than property bonds that satisfy your requirements, should be for cash. Where bonding cards are used as security, place the person under a personal recognizance, with the bonding company as surety. In the event the person desires to give a check and satisfies you as to the probable validity of the check, place the party on personal recognizance, with the check as surety only, make the check payable to me and do not issue any official receipt for the check. You might advise that the uttering of a bad check is a criminal offense. In the event the party should be found guilty and fined, the check will be used in payment of the fine if found to be valid. This would apply particularly to Service Personnel, obtain serial number, organization, address and any other information that you feel is pertinent. In the event any party desires to pay a forthcoming fine, I would like you to instruct the party that I like it paid in either cash or Money Order.

"I realize that there are constantly coming before you, problems that I have not answered. Keep in mind the fact that all persons are entitled to a reasonable bond. In the event that parties wish or can only make partial payment on a bond, accept the cash that is available and place them on a personal recognizance for the remaining portion of their bond.

"You will observe that the justices of the peace have been asked that in those cases where the person desires to give a check and satisfies the justice of the peace as to the probable validity of the check, that the party should be placed under personal recognizance with the check as surety only, that the check be made payable to the judge, and that an official receipt not be issued for the check.

"It will be appreciated if you will advise me as to whether the procedures outlined to the justices of the peace as to the taking of checks payable to the judge, without giving a cash bond receipt therefor, are in keeping with the general and special statutes relating to the taking of recognizances with and without sureties and the admitting of persons to bail by justices of the peace."

In my opinion, the procedure suggested by the County Judge is not supported by the statutory provisions. There is nothing in the Code authorizing a justice of the peace to take a check when admitting a person to bail, even though he may be satisfied that the check will be honored when presented for payment. Unless a person enters into recognizance with surety, a cash bond is mandatory. Whenever a justice of the peace accepts a cash bond, he becomes accountable therefor in accordance with the provisions of § 19-107, and, if he accepts a check instead of cash, even though the check may be payable to the County Court, or the judge thereof, he does so at his own risk.
BUILDING AND LOAN ASSOCIATIONS—Loans to Non-Members—May Not Charge Premium or Bonus in Addition to Interest. (72)

August 25, 1959

HONORABLE DELAMATER DAVIS
Member, House of Delegates

This is in reply to your letter of August 24, 1959, which reads as follows:

"In connection with a current study being made of the laws affecting State Chartered Building and Loan Associations, the question has been raised whether such Associations have the right under Sec. 6-156 of the Code to charge persons not shareholders a premium for making loans.

"The majority of the State Associations make real estate loans in accordance with the provisions of Article 5 of Title 6. By Section 6-172 that class of borrowers is limited to one vote at all meetings of the shareholders.

"Obviously the first sentence of Sec. 6-156 does not apply to the last mentioned class of borrowers. The next sentence provides that the Associations 'may lend money to other persons on such terms as are agreed upon, and in such manner as may be fixed by the by-laws.' (Emphasis supplied)

"The annotations set forth in the Code make it clear that the General Assembly 'may create a corporation with power to make contracts contrary to existing usury laws.'

"The answer depends, as I see it, on a construction of the italicized language.

"I await with interest your thought in this connection."

I do not feel that the word "terms" as used in Section 6-156 of the Code may be construed to authorize a Building and Loan Association to charge persons who are not shareholders or members any amount in excess of the statutory rate of interest. I think "terms" as used in this statute means time and amount of payments. The statute, it is true, expressly permits the Associations to require from a shareholder or member a premium or bonus in addition to the interest, and our Supreme Court has held that such a requirement is valid and not contrary to the usury laws. Shareholders and members obtain something more than the mere amount of the loan, while it does not appear that the class of borrowers under consideration here are in any different category than borrowers from other lending institutions.

Inasmuch as the statute does not specifically authorize any charges in excess of interest in connection with loans to persons who are not members or shareholders, I am of the opinion that the charging of a premium in such cases would not be a valid charge.

CITIES AND TOWNS—City Solicitor—May Not Prosecute Violations of Ordinances in Courts of Record—May Prosecute Same in Municipal or Police Justice Court. (109)

October 2, 1959

MR. J. RANDOLPH LARRICK
Attorney at Law

This is in reply to your letter of September 28, 1959, which reads as follows:

"I am writing you as City Solicitor of the City of Winchester, Virginia, for an answer to a question that has arisen in our City.
"The City of Winchester has a City Solicitor plus a Commonwealth's attorney elected by the people. The question has arisen as to what authority the City Solicitor has to prosecute violations under the City ordinances, most of which carry a small fine but some time in addition thereto a jail sentence. The problem has arisen as to whether the Commonwealth's attorney or the City Solicitor is the proper person to prosecute violations of the City ordinances.

"I understand that in most of the Cities the Commonwealth's attorney prosecutes violations of the City ordinances that are of a criminal or quasi criminal nature."

I have examined the charter of the city of Winchester (Acts of 1932, Chapter 39), and I find that it does not contain any provision with respect to a city solicitor. I understand from your letter of September 30th that the office of city solicitor has been established by an ordinance and that this ordinance states that he shall perform for the city such duties as may be required of him by the city council.

Section 15-415 of the Code provides that the attorney for the Commonwealth of a city shall perform like duties, receive the same fees and be subject to the same liabilities as attorneys for the Commonwealth of counties, and shall perform such other duties as may be prescribed by the charter of a city or by law or shall be lawfully imposed by the city council.

Section 119 of the Constitution provides that in every city, so long as it has a corporation court, or a separate circuit court, there shall be elected for a term of four years one attorney for the Commonwealth. Section 15-414 of the Code implements this provision. This constitutional section further prescribes that the duties and compensation of such officer shall be as prescribed by law.

Section 19-131 of the Code requires the attorney for the Commonwealth to prosecute any violation of any penal law whether in the name of the Commonwealth, or of a county or corporation. This office, in an opinion published in the Report of the Attorney General for 1937-'38, at page 27, held it would seem to be the general intendment of this statute that the Commonwealth's Attorney should prosecute all criminal cases in a court of record whether the offense charged be a violation of a State law or a municipal ordinance. I concur in this opinion.

The Commonwealth's Attorney of cities and counties are the chief law enforcement officers of such political subdivisions and the primary duty for the prosecution of violations of State laws and city and county ordinances in a court of record rests upon them. In my opinion, these duties may not be administered by some other official except in cases where the Commonwealth's Attorney is disqualified for some reason and an acting Commonwealth's Attorney is appointed under Section 19-4 of the Code.

This opinion is not to be construed as holding that the council of the city may not employ an attorney for the purpose of prosecuting persons charged with the violation of municipal ordinances in the municipal or police justice court. On appeal, however, to a court of record it is the duty of the Commonwealth's Attorney to prosecute for such violations.
"(1) Can a City Council, that has no other authority to hold a referendum, legally hold a referendum under a questionable law that is being litigated in the State Supreme Court?

"EXAMPLE:

"Charlottesville is contesting the legality of Senator McCue's S. B. #52 of 1959 (Extra Session) which added § 36-19.3 to the Code. With no other authority to hold a referendum again, but that provided by this addition which is being litigated, can a referendum now be held?

"(2) If the City Council should hold such a referendum under a law that turns out to be unconstitutional, would the City Council then be liable for illegal expenditure of public funds?"

You make reference to the case of Charlottesville Redeveloping and Housing Authority v. City of Charlottesville, Record No. 5123, which is now pending in the Supreme Court of Appeals of Virginia. This is an appeal from a decision of the Circuit Court of Albemarle County, Virginia holding § 36-19.3 of the Code of Virginia to be a special act, but not violative of any provision of the Virginia Constitution. I have examined the complete Record in this case, and I find no order enjoining the City Council from calling a referendum required by § 36-19.3. I can find no legal prohibition which would prevent the City Council from calling such a referendum at this time.

I am unable to give a dispositive answer to your second question. A similar question was before the Supreme Court of Appeals of Virginia in the case of Custis v. Lane, 17 Va. 579 (1811). The Court found it unnecessary to decide the question and apparently it has not been presented to the Court since that time. There is a presumption that an act of the General Assembly of Virginia is constitutional and, as heretofore pointed out, a Virginia court of competent jurisdiction has so held.

In view of the foregoing, the City Council would be acting under color of law in calling the referendum provided for by § 36-19.3. Although the authorities are divided, it would seem that the members of the Council would not be personally liable for the expenses involved in the holding of such a referendum should § 36-19.3 be later held unconstitutional.

CITIES AND TOWNS—Town Mayor—Salary as Mayor Sole Compensation — May Not be Employed in Another Capacity. (99)

September 22, 1959

HONORABLE J. L. CAMBLOS
Member of the House of Delegates

This is in response to your letter of September 5, 1959, in which you ask the following questions:

1. Section 15 of the Charter of the Town of Big Stone Gap (Acts of Assembly, 1932, Chapter 130) provides that the salary of the Mayor shall be fixed by the Town Council. Is this provision subject to § 15-420 or § 15-454 of the Code of Virginia?

2. If § 15-420 is applicable to the Town of Big Stone Gap, can the Mayor be remunerated for other services rendered the Town?

Section 15 of the Charter of Big Stone Gap reads as follows:
"15. The salary of the mayor of the town, as now constituted or hereafter elected, if any be allowed by the town council, shall be fixed by the town council, payable at stated periods; and no regulation diminishing such compensation after it has once been fixed, shall be made to take effect until after the expiration of the term for which the mayor, then in office, shall have been elected. The salary of the mayor when fixed shall so continue until changed by the town council."

The Charter of the Town of Big Stone Gap provides the manner in which the government of the Town shall be organized. The governing body (town council) is established pursuant to the provisions of the charter and not in conformity with the provisions of Chapter 14 of Title 15 of the Code wherein § 15-454 is contained. I am, therefore, of the opinion that the provisions of § 15-454 are not applicable to the Town of Big Stone Gap.

Section 15-420 of the Code reads as follows:

"The mayor shall preside over the council; and the council may direct the payment to the mayor of a salary not exceeding nine hundred dollars per annum, payable as the council may direct. Anything in the charter of any town in this Commonwealth in conflict with this provision is hereby repealed. In the event of the absence of the mayor, the council may appoint a president pro tempore. The mayor shall not receive any compensation for his services in trying violations of town ordinances or for other services rendered the town except the salary fixed by the council and all fees for such services rendered by him shall be paid into the treasury of the town."

The above-quoted section of the Code was formerly § 3028 of the Code of 1919 and was in effect when the charter of the Town of Big Stone Gap was enacted by the General Assembly. I am, therefore, of the opinion that Section 15 of the Town Charter authorizes the Town Council to fix the salary of the Mayor within the limits prescribed by § 15-420 of the Code.

The Council may request, but may not require, the Mayor to perform certain extra services in addition to his statutory duties in his capacity as Mayor of the Town. Section 15-420 of the Code provides, however, that the mayor shall receive only his salary as mayor and no other compensation for his services.

I am, therefore, of the opinion that the Mayor of the Town of Big Stone Gap may not be employed by the Town in some other capacity and be compensated in addition to his salary.

CITIES AND TOWNS—Transition—Merger—Consolidation. (120)

HONORABLE JOHN C. WEBB
Member, House of Delegates

October 13, 1959

This is in reply to your letter of October 12, 1959, in which you present these questions:

"1. Is it legally possible for a town to go direct to first class city status or is it necessary to go from town status to second class city status prior to becoming a first class city?

"2. Is it now legally possible for a town to merge with a city of a second class or a city of a first class?
With respect to question (1), § 116 of the Constitution provides that:

"All incorporated communities, having within defined boundaries a population of five thousand or more, shall be known as cities; and all incorporated communities, having within defined boundaries a population of less than five thousand, shall be known as towns."

This section of the Constitution further provides that:

"In determining the population of such cities and towns the General Assembly shall be governed by the last United States census, or such other enumeration as may be made by authority of the General Assembly."

Chapter 6 of Title 15 of the Code of Virginia prescribes the procedure to be followed in the circuit court for the transition of a town into a city. Chapter 7 of Title 15 of the Code prescribes the procedure for the transition of a city of the second class to a city of the first class.

It would seem under the procedure established under these general statutes that whenever a court establishes a city it first becomes a city of the second class, even though the population may be ten thousand or more. If the census taken under Chapter 6 shows a population of ten thousand or more, the city may be established as a city of the first class by complying with the steps required in Chapter 7. Under this latter chapter, in addition to the court action there must be a proclamation by the Governor.

The General Assembly may, without regard to the general laws cited herein, established a city of the first class pursuant to the provisions of Section 117 of the Constitution.

At the 1948 session of the General Assembly, the city of Waynesboro was granted a charter as a city of the first class. See Chapter 3, Acts of 1948. In December of the year 1947, the Circuit Court of Augusta County entered an order establishing Waynesboro as a city of the second class, effective January 1, 1948. The taxing power under the charter thus related back to January 1, 1948, when the charter became effective in February of 1948.

With respect to your second question, it appears that a town and city may consolidate under Article 4, Chapter 9, Title 15 of the Code, provided the city has a population of thirty thousand. Any political subdivisions eligible to consolidate under this Article may also consolidate under Chapter 552, Acts of 1956.

I do not know of any constitutional provision that would prevent the General Assembly from enacting appropriate legislation providing for consolidation of towns and cities where the city has a population of less than thirty thousand.

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CIVIL PROCEDURE—Chancery Causes—"Inactive" or "Suspended" Dockets—No Statutory Provision For. (264)

HONORABLE J. T. MARTZ
Clerk of Circuit Court for Loudoun County

March 14, 1960

This is in reply to your letter of March 11, 1960, which reads as follows:

"In our Clerk's Office we have been placing chancery causes in which no action has been had for sometime upon what is known as the 'suspended docket' and, of course, this has been done by orders entered by the Judge of our court."
"I have looked at Chapter 9 of the Code of Virginia which seems to be the only chapter of the Code dealing with the matter and I can find no reference to 'suspended dockets.' I would appreciate it if you would advise me if there is a section of the Code that deals with 'inactive or suspended dockets.'

"If there is such a thing as a 'suspended docket' and a cause is placed thereon, will you please advise me the effect thereof. I am assuming that on motion of any party in interest such a cause could be restored to the active chancery docket.'

I am not familiar with any statute which provides for inactive or suspended dockets.

Section 8-154 of the Code establishes the procedure for striking cases from the docket and for the reinstatement thereof.

CIVIL PROCEDURE—Executions—Fieri Facias Issued by Court of Record —No Limitation on Return. (299)

March 31, 1960

HONORABLE J. ROBERT SWITZER
Clerk of Circuit Court of Rockingham County

This is in reply to your letter of March 30, 1960, which reads as follows:

"I would very much appreciate it if you would give me the Section of the Code which provides when executions issued from a Court of Record shall be returnable. I refer you to Section 8-44 of the Code of 1950 as amended in 1954.

"I am unable specifically to find a Section which says 'as provided by statute or rule of court' in the Act of 1954."

§ 8-44 of the Code, as amended by Chapter 333, Acts of Assembly 1954, reads as follows:

"Process from any court, whether original, mesne, or final, may be directed to the sheriff or sergeant of any county or city. If it appears to be duly served and good in other respects, it shall be deemed valid although not directed to any officer, or if directed to an officer, though executed by some other person. It shall be returnable to the clerk's office within such time as provided by statute or rule of court except that a summons for a witness shall be returnable to whatever day his attendance is desired, and process awarded in court may be returnable as the court may direct, and the return day on the summons or garnishment may be according to the provisions of § 8-442."

This section relates to any process from any court, except where special provision is made either by statute or Rule. I am unable to find that there is any statute or Rule requiring a fieri facias from a court of record to be returnable within a certain time. A writ of this nature from a court not of record shall be returnable within sixty days from the date of its issuance. § 16.1-99 of the Code. Prior to the 1954 amendment such process from a court of record was required to be returnable within a ninety-day period.

§ 8-399 of the Code relating to the issuance of a writ of fieri facias by a clerk of a court of record fails to place a limitation of time upon the return day.
April 7, 1960

HONORABLE C. VINCENT HARDIWICK
Judge, County Court of
Essex County

This is in reply to your letter of April 4, 1960, which reads as follows:

"As Judge of the County Court of Essex County, Virginia, I have been requested by an execution creditor who obtained judgment in my court, to issue a summons against the judgment debtor, who is now a resident of Henrico County, to appear before a Commissioner in chancery, in Richmond, to answer interrogatories. Title 8, section 435 of the Code, which pertains to the issuance of the summons is not clear to me. The section seems to provide that a summons may be issued by me, for the debtor to appear before a Commissioner in Chancery, only 'if the writ (of fieri facias) was not issued by such trial justice.' Is that the correct interpretation of the statute?

"If I cannot issue the summons what recourse does the execution creditor have under this section?"

Section 8-435 must be read and considered along with the provisions of Section 16.1-103. In my opinion, under the provisions of the first two sentences of Section 16.1-103, a judge of a court not of record may issue such a summons, although the execution was issued by the same judge. The provisions of Section 8-435 are confusing, but, in my opinion, Section 16.1-103, which was formerly Section 16-71 of the Code, clarifies the matter.

December 18, 1959

HONORABLE ROBERT D. HUFFMAN
Clerk of Circuit Court of Page County

This is in reply to your letter of December 10, 1959, in which you state:

"The question has arisen here as to whether a person acting in a fiduciary capacity can voluntarily execute an additional bond before the Clerk, subsequent to his initial qualification, without an order of the Court. I have taken the position that he cannot, because if the Clerk has the authority to increase a bond he would also have authority to decrease one which in my opinion is certainly not contemplated by the statutes, and would also place the Clerk in the position of adjudicating the sufficiency of all fiduciary bonds."

As you are aware, the powers and duties of the clerks of courts are derived primarily from statutes. If the person "acting in a fiduciary capacity" is a trustee, I am of the opinion that the provisions of §§ 26-1 et seq., of the Code of Virginia require an order of the court before such person may "voluntarily execute an additional bond." In particular, § 26-3 specifies:

"The court, under whose order or under the order of whose clerk any such fiduciary derives his authority • • • may, at any time, • • •
order him to give before such court a new bond in a reasonable time to be prescribed by it in such penalty * * *.”

It follows that if the fiduciary is a trustee, the court must enter an order before the clerk can receive and file the new bond.

Where the “person acting in a fiduciary capacity” is an executor, administrator, curator, etc., the provisions of §§ 64-73, et seq., confer upon the clerk of the probate court the power to perform certain functions in connection with the bond required by statute of such fiduciaries. However, it is generally held that the clerk of the court cannot accept, without an order of court, a new bond or an additional bond which will take the place of the original bond entered into by the fiduciary. I am in agreement with your position that an order of the court must necessarily be entered before a person acting in a fiduciary capacity of this latter type may execute a new bond which the clerk must accept.

Your attention is directed to Lamb, *Virginia Probate Practice*, The Michie Company, 1957, in which the author, on page 16 of the volume, makes the following suggestion:

“But it is recommended that rule of court be adopted providing that the Clerk shall act as probate judge, or surrogate, only in the initial proceeding and that all steps thereafter be before the court; when, for instance, there is a change in personnel, a new bond is to be given, a will is found after qualification of an administrator, and every proceeding subsequent to the initial qualification. There are so many such subsequent proceedings that lie beyond the jurisdiction of the Clerk that it is thought best for him to undertake none; the Clerk cannot, for example, accept a new bond, accept a resignation, revoke powers, or in any manner discipline a fiduciary. A uniform rule of this kind obviates the necessity of deciding the jurisdiction question in each case as it arises.”

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**CLERKS—Compensation of Deputies and Other Employees—Additional Appropriations by County Board of Supervisors. (247)**

*February 8, 1960*

**HONORABLE JAMES M. SETTLE, Clerk**

Circuit Court of Rappahannock County

This is in reply to your letter of January 28, 1960, which I quote in its entirety.

“The State Compensation Board has fixed the compensation for the help in my office as follows: Ruth Stevens, Deputy $2520; Extra Help $1200. The Board of Supervisors of this County has also attempted to set the compensation for this help in the following manner: Ruth Stevens, Deputy $3000; Extra Help $800.

“As it is necessary for me to determine how to run the office for this year and to employ my help I would appreciate it if you would advise me whether the allowances set by the Compensation Board or the Board of Supervisors controls.

“Reference is made to the following code sections for your consideration and interpretation: 14-151; 14-164.2; 14-164.3.”

Sections 14-151 and 14-152 of the Code of Virginia of 1950, as amended, provide, in part, that the State Compensation Board shall determine: (1) how many deputies and assistants, if any, are necessary to the effective performance of
the duties of the clerk, (2) what should be the compensation of such deputies and assistants, and (3) the manner in which such compensation should be paid.

The primary purpose of the foregoing statutes is to provide for the expense of assistants for clerks of court, the sum of which, when combined with other office expenses and the annual compensation of the clerk, will govern the maximum allowance to which the clerk is entitled for maintaining his office. Any sums of money paid into the clerk's office in excess of the maximum amount allowed by the State Compensation Board must be paid into the State treasury pursuant to Section 14-150 of the Code.

Section 14-164.3 of the Code of Virginia of 1950, as amended, provides that the governing body of any county having a population of less than twenty-three thousand may contribute any amount it deems proper toward the salary or compensation of the deputy clerk or other employees of the circuit court of the county. The purpose of this section of the Code is to provide extra funds for maintaining the clerk's office in those localities where normal receipts of the clerk's office are insufficient to reach the maximum amount allowed by the State Compensation Board for the maintenance of that office.

As pointed out by the Honorable Abram P. Staples, Attorney General, in a letter addressed to the Honorable LeRoy Hodges, Comptroller, under date of January 25, 1939, a copy of which is enclosed herewith, the last mentioned section of the Code provides for additional compensation to be paid directly to the deputy clerk, and is a matter over which the State Compensation Board has no control.

It is, therefore, my opinion that the allowances made by the State Compensation Board for your deputy and extra help are material only in establishing the maximum amount allowed you for the operation of your office, beyond which any excess fees collected by your office must be paid into the State treasury. The salaries to be paid out of the general county revenues to your deputy clerk and extra help are those amounts appropriated by the Board of Supervisors of Rapahannock County. You would, nevertheless, be authorized to supplement those salaries from your office receipts, provided such payments do not exceed the maximum sum fixed by the Compensation Board for maintaining your office.

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CLERKS—Compensation of Substitute Designated From Other Jurisdiction—Not to be Paid from Treasury, but County or City May be Ordered to Pay Expenses. (322)

April 22, 1960

HONORABLE SIDNEY C. DAY, JR.
State Comptroller

This is in reply to your letter of April 21, which reads as follows:

"Code Section 14-125 provides a fee of $2.50 to the Clerk of Court for services in a felony case tried in his Court.

"Should the Clerk be incapacitated and unable to perform his duties, and his deputy has no Court experience, would the Court, in your opinion be authorized to bring in a Clerk from another county and pay him a per diem and expenses under Section 19-291?"

The authority of the judge of a court of record to designate a clerk from another jurisdiction to temporarily perform the duties of the clerk who is incapacitated, is contained in § 15-485.1 of the Code. The last paragraph of this section is as follows:
"No compensation out of the State or local treasury shall be paid such person designated under this section for his services while acting in such capacity but any expense incurred shall be paid by the county or city in which such service is performed upon the order of the judge of said court."

It will be noted that under this provision no compensation may be paid to a clerk from another jurisdiction who is appointed under this section. This section provides that such temporary clerk shall be paid his actual expenses and that such payments shall be paid by the county or city in which such service is performed upon the order of the judge of said court.

Therefore, in view of this statutory provision, I am of opinion that no payments could be made to such temporary clerk under the provisions of § 19-291 of the Code.

CLERKS—Courts Not of Record—Are Conservators of the Peace and May Issue Warrants. (32)

Honorable John R. Dudley, Judge
Loudoun County Court

This is in response to your letter of July 9, 1959, inquiring if the clerk of a county court, designated a conservator of the peace pursuant to Section 16.1-44, Code of Virginia, would have authority to issue warrants contemplated under Section 18-10 of the Code.

Section 18-10 provides as follows:

"If complaint be made to any such conservator that there is good cause to fear that a person intends to commit an offense against the person or property of another, he shall examine on oath the complainant, and any witness who may be produced, reduce the complaint to writing, and cause it to be signed by the complainant; and if it appear proper, such conservator shall issue a warrant, reciting the complaint, and requiring the person complained of forthwith to be apprehended and brought before him or some other conservator."

Moreover, Section 16.1-44, as amended, also provides:

"The clerk shall be a conservator of the peace within the territory for which the court has jurisdiction, and may within such jurisdiction issue warrants and processes, original, mesne and final, both civil and criminal, and issue subpoenas for witnesses, writs of fieri facias and writs of possession, and abstracts of judgments. He may take affidavits and administer oaths and affirmations, take and certify depositions in the same manner as a notary public, take acknowledgments to deeds or other writings for purposes of recordation, and exercise such other powers and perform such other duties as are conferred or imposed upon him by law. Such clerk shall keep the docket and accounts of the court and shall discharge such other duties as may be prescribed by the judge."

It is noted that Section 18-10 refers to "any such conservator" and that it follows Section 18-9, which lists certain persons who are conservators of the peace,
but does not include a clerk of a county court in such list. However, 16.1-44, which was enacted subsequent to Sections 18-9 and 18-10, now gives such clerk the status and authority of a conservator of the peace and specifically gives him broad authority in connection with the issuance of warrants, etc. It would further appear that Section 18-10 refers to the office of the conservator of the peace rather than the specific officers mentioned in Section 18-9, and that the clerk of a county court has by subsequent statute been classified as a conservator of the peace.

Accordingly, I am of the opinion that the clerk of a county court having the status of a conservator of the peace pursuant to Section 16.1-44 has authority to issue warrants contemplated under Section 18-10.

CLERKS—Judgments—Duty to Mark Satisfied. (133)

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

This is in reply to your letter of October 17, 1959, which reads as follows:

"I would like your opinion on the question of release and satisfaction of judgments by the Clerk when the creditor or his attorney directs the Clerk by letter to release a judgment.

"In the past I have been reluctant to release such a judgment, but have required the creditor, his attorney or attorney-in-fact to release the judgment on the lien docket. In so doing I have followed Section 8-382 of the Code, which states that such entry of payment or satisfaction shall be signed by the creditor, his duly authorized agent or attorney, and be attested by the Clerk in whose office the judgment is docketed.

"I am familiar with Section 8-380 of the Code which states that the fact of the payment or discharge, either in whole or in part, of any judgment so docketed, shall be entered by the Clerk in whose office the same is so docketed, whenever it shall appear from the return of an execution issued from his office, or from a certificate of the Clerk from whose office such execution is issued, that the same has been satisfied, in whole or in part, or upon the direction of the judgment creditor or his attorney. This is recited in Section 6465 of the Code of 1942, and follows the sections dealing with abstracts from other Courts where the original judgment was docketed and execution issued thereon.

"When the Code was recodified and the 1950 Code was published the sections do not follow one another as they did in the Code of 1942, and reading from the 1950 Code, Section 8-380, it would appear, as it has to some attorneys, that the Clerk can release an original judgment in his office by mere direction, but I still believe Section 8-380 deals with abstracts from other Courts and that Section 8-382 should be followed where the original judgment is docketed in my office.

"Please let me know if the Clerk can release a judgment by mere direction in a letter from the creditor or his attorney."

The Code sections to which you refer are found in Article 6, Chapter 18 of Title 8 of the Code. These sections, along with the sections contained in Article 5 of this chapter, were enacted by Chapter 498, Acts of 1902-3-4, amending Sections 3559, 3560, 3562 and 3563 of the Code of 1887. In the 1919 revision of the
Code they were renumbered 6461, 6463, 6465 and 6466. The new numbers now appearing in the Code were designated by the revisors of the Code of 1950. An examination of these sections, and the Acts of Assembly by which they were created and, from time to time amended, reveals that there have been no material changes made that would justify a conclusion that under Section 8-380 of the Code of 1950, a Clerk does not have the duty of entering on the judgment lien docket the fact of payment or discharge upon the direction of the judgment creditor or his attorney. The Clerk should note on the judgment lien docket that his entry is made pursuant to a directive in writing received from either the judgment creditor or his attorney, as the case may be, which writing would be filed with the other papers pertaining to the judgment.

Upon inquiry at the Clerk's Office of the Chancery Court of Richmond, I find that the above procedure is followed in that office.

I enclose a copy of an opinion rendered by Attorney General Staples with respect to this question, which opinion is published in the Report of the Attorney General for 1941-'42 at page 28.

CLERKS—Judgments—Forfeited Recognizances—No Liability Where Accepts Worthless Check in Satisfaction. (116)

Honorable Thomas R. Miller
Clerk of the Hustings Court of the City of Richmond

October 12, 1959

This is in reply to your letter of October 5, 1959, which reads as follows:

"A question has arisen in regard to the payment of judgments rendered in favor of the Commonwealth on forfeited recognizances as to whether there is personal liability on a Clerk of Court who accepts a check for such payment and the check turns out to be no good. Of course I realize that under Section 19-329 of the Code, all fines must be paid in cash and if the Clerk accepts a check therefor and issues his official receipt, he is personally liable for failure to collect on the check, but it has been my understanding that as a judgment on a forfeited recognizance is a civil proceeding, not under the criminal statutes, that there would be no personal liability on the Clerk, as the position of the Commonwealth is in no wise injured from what it was, if the check proves to be worthless. The judgment would, I believe, still stand in full force and effect, therefore it has been my practice to accept checks for such payments, not marking the judgment as satisfied until the same has cleared."

In my opinion, the judgment in favor of the Commonwealth on a forfeited recognizance is in the same category as any other judgment in favor of the Commonwealth. If a clerk accepts a check in satisfaction of the judgment, and the check proves to be worthless, there will be no liability upon the clerk to the Commonwealth, unless the right of the Commonwealth to enforce the lien of the judgment has been impaired in the meantime.

It occurs to me that when a clerk receives a check in satisfaction of a judgment, he should note on the receipt, which he is required to give, a statement to the effect that the receipt is conditioned upon the check being paid on presentation to the bank, and, if paid, the judgment will then be marked satisfied.
CLERKS—Recordation—Chattel Deed of Trust Covering Milk Tank Installed On Truck May be Recorded in Miscellaneous Lien Book or Docketed in Agricultural Chattel Deed of Trust Book. (310)

April 14, 1960

HONORABLE J. T. MARTZ, Clerk
Circuit Court of Loudoun County

This is to acknowledge receipt of your letter of April 9, 1960 in which you request the opinion of this office concerning the recordation of an instrument which purports to create a lien on a milk tank installed on a truck. This person uses the same not as a farmer, but hauls milk for hire.

Further, you state that there is a local Farm Equipment Company which intends to execute a chattel deed of trust covering farm equipment and machinery, which machinery and equipment he holds for sale and desires to have same recovered.

I shall answer your questions seriatim:

QUESTION 1:
Should the milk tank be considered as farm equipment and be recorded in the Agricultural Deed of Trust Book without the payment of a recording tax?

ANSWER: From what you state, the milk tank is attached or affixed to the truck and is therefore not an essential part of the truck. It would follow that the lien could not be recorded on the title certificate issued under the provisions of Title 46.1 (Motor Vehicle Code). Unless otherwise provided all deeds of trust on personal property, bills of sale, etc., are recorded in the Miscellaneous Lien Book (Section 17-61). Hence, in order to be otherwise recorded, the instrument must clearly come within the exclusions to Section 17-61. Section 43-44 provides that any person, firm or corporation, etc., may give as security a chattel deed of trust on farm machinery and form equipment, etc. Such an instrument is docketed in the Agricultural Chattel Deed of Trust Book in accordance with Section 43-53 of the Code. This section provides, however, that the beneficiary of the chattel deed of trust may elect to have the instrument recorded in the Miscellaneous Lien Book. As a tank affixed to a truck used for the purpose of hauling milk is not farm machinery or farm equipment as those terms are usually applied, it is extremely doubtful whether it will be proper to record such an instrument in the Agricultural Chattel Deed of Trust Book. It is my opinion that the same should be recorded in the Miscellaneous Lien Book.

QUESTION 2:
Is it the duty of the Clerk to pass upon the business or profession of the maker of the trust when such information is known or available to him, this only as far as proper recordation is concerned?

ANSWER: In my opinion the business or profession of the maker of the trust is not the deciding point in determining where the instrument should be recorded. If it is apparent from the face of the instrument that it covers the chattels as described in Section 43-44 irrespective of the profession or business of the maker, the instrument should be recorded in the Agricultural Chattel Deed of Trust Book otherwise in the Miscellaneous Lien Book.

QUESTION 3:
Should the Farm Equipment Company trust be recorded in the Agricultural Deed of Trust Book or Miscellaneous Lien Book?
ANSWER: For the reason stated above, it is my opinion that the chattel deed of trust executed by this company should be docketed in either the Agricultural Deed of Trust Book or recorded in the Miscellaneous Lien Book, at the election of the beneficiary of the trust (Section 43-53 of the Code). In this particular case, this would be the Agricultural Chattel Deed of Trust Book.

CLERKS—Recordation—Deeds of Easement—Easements of Right of Way For Sewer Lines—Reference to Page of Master Plat Book Insufficient to Describe Where Town Acquiring Rights. (296)

April 1, 1960

HONORABLE RHEA F. MOORE, JR.
Clerk of Circuit Court of Tazewell County

This is in reply to your letter of March 30, 1960, which reads as follows:

"The Town of Richlands, Virginia is now preparing to secure rights-of-way from property owners for the construction of sewer mains and feeder lines to its new sewerage disposal plant.

"The consulting engineers on this project have prepared seventy sheets of maps and detailed drawings, showing locations of these lines, elevations, etc. The town attorneys have requested permission to file a certified copy of these maps and drawings in this office, binding them into a plat book. They wish to know, and we are raising the same question to you, if the attorneys then could set up a concise right-of-way easement form, and use a certain sheet number from this plat book as reference points, rather than writing a lengthy deed for each such easement.

"We raise the further question that since the dimensions of this book will be approximately 26" x 38", can we receive a volume of that size for filing in this office, and the allowable fee for such filing."

I am not aware of any statute under which the town of Richlands may record the plats in the manner suggested. The town may, pursuant to the provisions of § 15-765 of the Code, record a plan of the town by following the procedure there set forth. This plan could, of course, indicate the location of the proposed easements. However, I doubt whether a conveyance of the easements by the property owners by mere reference to the pages of a plat of that type would suffice.

It would seem that the town would prefer that a plat be attached to the deed of a property owner, showing the location thereon of the easement.

The clerk may, in his discretion, maintain a book to be known as a plat book. This is provided in § 17-68 of the Code, which also prescribes the limitations with respect to the size of plats or maps which may be recorded.

Generally, the statutes relating to recordation of plats, pertain to property owners who are establishing a subdivision consisting of lots, streets and alleys.

CLERKS—Recordation—Instruments Evidencing Liens on Agricultural Personal Property. (198)

HONORABLE EVA W. MAUPIN, Clerk
Circuit Court of Albemarle County

This is in reply to your letter of December 18, 1959, in which you made
reference to the opinion printed in the Report of the Attorney General, 1958-1959, at page 26, discussing recordation of chattel deeds of trust upon livestock, and you state:

"1. We use a book for Federal Farm Credit Lien Docket, in which we record Federal Farm Liens only.

"2. We have printed pages, according to Acts 1946, chapter 178, which we have been docketing liens other than to the Federal Government, but have put them, about 50 pages, in each of our Miscellaneous Lien books. This was done at the suggestion of the Everett Waddey Book Co., who stated that a good many of the Clerks were doing it.

"My question: should I continue to do as I have previously done or should I put the liens payable to individual banks and persons in the Federal Farm Credit Lien docket?"

The "Federal Farm Credit Lien Book" to which you refer was required to be kept by clerks of circuit courts by § 5 (a) of Chapter 336, Acts of Assembly, 1936, for the docketing of deeds of trust upon agricultural or other personal property, but not upon real estate. This Act was repealed by Chapter 178, Acts of Assembly, 1946, which prescribed that the clerks should keep the "Agricultural Chattel Deed of Trust Book" for the docketing of such deeds of trust. Chapter 178, Acts 1946, is codified as §§ 43-44 through 43-61, inclusive, of the Code of Virginia, 1950.

Section 43-53 of the Code contains a proviso, pursuant to which the beneficiary under any such agricultural chattel deed of trust may elect to have the same recorded at length in the Miscellaneous Lien Book in lieu of docketing in the Agricultural Chattel Deed of Trust Book, with the clerk then cross-indexing such instrument in both books.

If the instrument proffered is a "crop lien" agreement, it should be recorded in the "Crop Lien Book," in accordance with § 43-27 of the Code. If it is a contract or lien upon personal property, not a deed of trust or mortgage, and not mentioned in § 43-27, in §§ 55-88 to 55-90 (conditional sales), or in any other statute prescribing mode of recordation, the provisions of § 17-61 are applicable and the instrument should be recorded in the Miscellaneous Lien Book.

Assuming that the "liens" to which you refer are deeds of trust covering agricultural personal property, all such deeds of trust should be docketed in the Agricultural Chattel Deed of Trust Book, unless the beneficiary elects to have the same recorded at length in the Miscellaneous Lien Book, under § 43-53 of the Code. The Federal Farm Credit Lien Docket Book is no longer required by statute, although § 17-67 still requires the keeping of the "Federal Farm Loan Mortgage Book" for the recordation of mortgages upon real estate where the loans thereon are made by federal land banks.

CLERKS—Recordation—Maps and Plats, Authority to Record in Deed Book. (308)

April 12, 1960

HONORABLE T. F. TUCKER, Clerk
Corporation Court of the
City of Danville

This is to acknowledge receipt of your letter of April 4, 1960 requesting opinion of this office on several questions concerning the recordation of plats and maps.
Your questions will be answered seriatim:

QUESTION 1:

Is there any specific section of the Code of Virginia which authorizes a Clerk of a Court of Record to record in the deed book (not a plat book) a plat or map which is "not attached to, or made a part of, any deed, deed of trust, or other writing"?

ANSWER: Section 55-106 provides that any writing which is properly acknowledged may be recorded in the Clerk's Office of the appropriate court. Section 17-60 provides in part: "All deeds, * * * and all other writings relating to or affecting real estate which are authorized to be recorded shall, unless otherwise provided, be recorded in a book to be known as the deed book."

Section 17-68 provides in part: "All plats and maps may in the discretion of the clerks of the several circuit, corporation or hustings courts be recorded in a book to be known as the plat book. * * * No clerk, however, shall be required to spread upon the records of his office any such plat or map if it be larger than the sheets of the deed book or plat book kept in his office." (italics supplied)

It will be noted that Section 17-68 leaves it in the discretion of the clerks of the courts whether or not to record plats and maps in the plat book. Section 17-60 makes it mandatory upon the clerks to record all writings relating to or affecting real estate in the deed book unless otherwise provided. When the clerk elects to keep a plat book, then it is not necessary for him to record the plats or maps in the deed book.

Reading these three sections together, I believe that the intent of the same is to require the recordation of such plats or maps, which are not necessarily a part of any deed provided same are duly acknowledged or proved, in the deed book, unless the clerk has elected to record them in the plat book.

QUESTION 2:

Does the language of Section 17-60, particularly the words "all other writings" in the eighth line, include maps and plats? Also, if the word "writings" includes within its meaning maps and plats, where, if any, is the authority for recordation mentioned in the 9th line of Section 17-60?

ANSWER: It is my opinion that the term "all other writings" includes maps and plats within the meaning of the provisions of Section 17-60.

QUESTION 3:

If the answer to the first question is in the affirmative, do such "unattached" maps and plats have to be duly acknowledged before recordation?

ANSWER: Before an unattached map or plat can be recorded either under the provisions of Section 17-60 or 17-68 as the case may be, it is necessary for the same to be acknowledged or proved in accordance with Section 55-106 of the Code of Virginia. In those instances where the plat or map does not bear an acknowledgement or is proved by the statute, it is the duty of the clerk to receive the same and if the same is not acknowledged within six months then to place it in a book in accordance with the provisions of Section 55-111 of the Code.

QUESTION 4:

If there are not provisions for the recordation of "unattached" maps and plats, is there any prohibition against such recordation?
ANSWER: As there are provisions in the statute permitting recordation of unattached maps or plats, of course, it would follow that there would be no prohibition against such recordation.

QUESTION 5:

Is there any liability upon the Clerk for recording “unattached” maps or plats in the deed book, if there is no authority for such recordation?

ANSWER: I can perceive of no reason which would place liability upon the Clerk in recording unattached maps or plats in the deed book. As indicated above, such documents must be recorded by the clerk and if he elects to keep a plat book, the same may be used for such recordation. If the Clerk does not so elect, then he must record such maps and plats in the deed book.

CLERKS—Records—Liability For Loss of. (184)

HONORABLE JAMES M. SETTLE, Clerk
Circuit Court of Rappahannock County

December 14, 1959

I am writing in further connection with my letter of December 8, 1959, in response to your inquiry of November 20, 1959, concerning the liability of a clerk of a court of record for the loss of court records and other papers in the clerk's office.

Although the clerk of a court, as a public ministerial officer, is liable for acts of negligence or misconduct in the performance of his official duties whereby damage results to a complaining party, 10 Am. Jur. 955, Clerks of Courts: Section 20, I have been unable to discover any decision of the Supreme Court of Appeals of Virginia in which the precise question you present has been considered. However, in light of the authority of a court to order the restoration or substitution of its records, or parts thereof, which may have been lost or destroyed, I am constrained to believe that ordinarily no liability would attach to the clerk of a court of record in the circumstances concerning which you inquire.

With respect to the above mentioned authority of courts of record, the general rule is well stated in 34 Am. Jur. 605, Lost Papers and Records: Section 33, in the following language:

"Every court of record has supervisory and protective charge over its records and the papers belonging to its files, and has the authority to correct them in accordance with the facts, or to substitute or supply missing records or papers where the originals are lost or destroyed. This may be done by the court at any time, as well after as during the term. This power is a matter of necessity, whether the loss occurs while the cause is in fieri, before it has progressed to final judgment, or after such judgment has been rendered, and whether the loss is of the whole record or of papers which when it is finally made up will constitute a part of it. When the clerk is directed by the court to restore matters to the record, he acts under the control and authority of the court, and the matters thus substituted, by order of the proper court, become records of equal validity to those which are destroyed."

In Virginia, ample provision for the restoration of records and papers which have been filed in a clerk's office and have subsequently been lost or destroyed
is made in Section 8-280 through Section 8-284 of the Virginia Code, in which statutes the procedure for establishing such documents is set forth. Moreover, Section 8-209 of the Virginia Code prescribes the procedure to be followed when the original papers in a case, or the record of a case in an appellate court, have been lost or destroyed.

In *Supervisors v. N. & W. R. Co.*, 119 Va. 763, 770, the Supreme Court of Appeals of Virginia, citing *Gaines v. Merryman*, 95 Va. 660, 665, commented upon the effect of the loss or destruction of court records in the following manner:

"Such loss or destruction gives rise to no presumption and has the effect merely of changing the mode of proof of such records, admitting secondary evidence in the place of an exemplification of the record."

In light of the above mentioned provisions for the restoration of court records and proof of the contents thereof, I am of the opinion that the clerk of a court of record would not be individually liable for the loss of records or other papers filed in the clerk's office.

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**CLERKS—Temporary Disability—Appointment of Deputy by Judge of Circuit Court—§ 15-485.1 Construed.** (9)

*Honorable Daniel Weymouth*
Judge, Twelfth Judicial Circuit

This is in response to your letter of July 3, 1959, pertaining to a situation where a deputy clerk might be appointed pursuant to Section 15-485.1, Code of Virginia, when the clerk of a court of record is unable to perform duties, and inquiring (1) how is such deputy to be paid? (2) Is he to be paid out of the fees of the office? (3) If so, is the disabled clerk to be paid fees after payment of this deputy and other deputies?

Section 15-485.1 provides as follows:

"Whenever it is found by the judge of a court of record that a clerk of court is, by reason of mental or physical disability, temporarily unable to perform his duties, the judge of the court may, by order entered of record, designate some other person as deputy clerk to perform the duties of such clerk. The person so designated may be the clerk or deputy clerk of another county or city or any other qualified person and in the event that he be from another county or city, the provisions of Secs. 15-486 and 15-487 shall not apply.

"The person so designated shall thereby become a deputy of the regular clerk and shall be vested with all the authority of a regular clerk and may perform all acts which are required by law to be performed by such clerk with the same effect as if performed by the clerk for whom he serves as deputy, and shall before entering upon his duties take the oath now prescribed for county officers, and furnish bond in the same amount as is required of the clerk.

"The person so designated shall serve at the pleasure of the court during the disability of the clerk and within the limits of the unexpired term of the clerk.

"No compensation out of the State or local treasury shall be paid such person designated under this section for his services while acting in such capacity but any expense incurred shall be paid by the county
or city in which such service is performed upon the order of the judge of said court."

It is the opinion of this office that, pursuant to the last paragraph of the above section, no compensation (out of the State or local treasury) shall be paid such person designated under this section for his services while acting in such capacity. However, provision is made for the payment of expense incurred, which would be in the usual form for the reimbursement of expenses. This item would be payable upon the order of the judge and out of the county funds and not out of the fees collected by the clerk's office.

There is no provision diminishing the compensation which would normally be paid to the disabled clerk. Moreover, a disabled clerk does not lose his office for that reason. Accordingly, it is my opinion that such disabled clerk would continue to receive his usual and normal compensation to the same extent he would have received it had no deputy been appointed under this section.

It would seem that this section contemplates appointments for temporary service only to perform such service as the regular deputies appointed under Section 15-485 would not be authorized or qualified to perform.

COMMONWEALTH ATTORNEYS—Counties—Fees in Annexation Cases—Board of Supervisors May Pay Special Compensation for Services Rendered in. (6)

HONORABLE W. CARY CRISMOND
Clerk, Circuit Court of
Spotsylvania County

This is in reply to your letter of July 8th, which reads as follows:

"I have been instructed by the Board of Supervisors to write to you and ask the ruling on the following question:

"1. Whether the Commonwealth's Attorney can be paid a fee for defending an annexation case in this county, and whether he can be paid a fee by the county for defending a Sanitary District case."

With respect to the first part of your question relating to whether the Commonwealth's Attorney may be paid a fee for defending an annexation case, I am enclosing copy of an opinion issued on June 10, 1959, to the Commonwealth's Attorney of Isle of Wight County, in which this question is answered. You will note that this opinion holds that the governing body of the county may pay the Commonwealth's Attorney special compensation for his services in connection with an annexation case.

With respect to the second part of your question, relating to sanitary districts, I do not know of any statute which would authorize the payment of additional compensation to the Commonwealth's Attorney for such service.

COMMONWEALTH ATTORNEYS—Hours Required to be Spent in Office Provided by County—No Statutory Requirement, Hence Discretionary—Private Practice—No Statutory Prohibition. (14)

HONORABLE W. CARY CRISMOND
Clerk, Circuit Court of
Spotsylvania County

This will acknowledge your letter of July 8th, which reads as follows:
REPORT OF THE ATTORNEY GENERAL

"I have been instructed by the Board of Supervisors to write to you and ask the ruling on the following question:

"1. Whether it is permissible for the Attorney for the Commonwealth to close his office at the County seat and practice law privately in his office in Fredericksburg for each afternoon, leaving no one in his office at the Courthouse."

There is no statutory provision relating to this question. Section 15-689 of the Code provides that the Board of Supervisors of each county shall, if office space is available, provide an office in the courthouse for the Commonwealth's Attorney. If no space in the courthouse is available for such purpose, then the Board may provide office space for this officer elsewhere than in the courthouse.

The foregoing section of the Code, it will be noted, is silent with respect to the specific question presented, and, as I have stated, I do not know of any statute which prescribes the number of hours this officer shall spend in his office quarters. In my opinion, the Commonwealth's Attorney may exercise his discretion with respect to this matter.

There is no statutory provision requiring the Commonwealth's Attorney to refrain from engaging in the private practice of law. Of course, it would not be proper for this officer to act as counsel in a private capacity in any case that would conflict with the duties of his office.

COMMONWEALTH ATTORNEYS—May Represent Client on Appeal to Supreme Court of Appeals in Criminal Case Arising Prior to Qualification as Public Officer. (265)

March 14, 1960

HONORABLE E. SUMMERS SHEFFEY
Commonwealth's Attorney for Washington County

This is in reply to your letter of March 8, 1960, which reads as follows:

"I am a practicing attorney in Washington County, Virginia with offices at Abingdon.

"In the regular term of court of 1959, I had occasion to represent a defendant by the name of William V. Phillips who at that time was convicted of the crime of sodomy. Shortly thereafter I applied to the Supreme Court of Appeals for a writ of error. This date I have received notice from that court that a writ of error and supersedeas has been awarded in the case of Phillips.

"Subsequent to the trial of Phillips I was elected to the office of Commonwealth's Attorney of Washington County and presently hold that office. I would like very much to represent Phillips before the Supreme Court of Appeals in the argument of his case. However I am aware that a possible conflict of interest is involved considering my present position as Commonwealth's Attorney.

"At your very earliest convenience would you be kind enough to give me your opinion as to whether I might legally and ethically appear on behalf of the defendant Phillips in the Supreme Court of Appeals?"

This is a question which apparently has never been presented to the Committee on Ethics of the Virginia State Bar. I have discussed this matter with
Honorable R. E. Booker, Secretary, and with William H. King, Esquire, who is Chairman of the Committee on Legal Ethics. These gentlemen are of opinion that it would not be improper for you to represent your client in the Supreme Court of Appeals. I am in accord with their opinion. We feel, however, that you should emphasize in your brief and in your oral statement to the Court the circumstances in connection with this matter.

It is our opinion that in the event the Supreme Court should reverse the case and it should be tried again it would be improper for you to continue in the case in any capacity.

COMMONWEALTH ATTORNEY—Meetings of Board of Supervisors—May be Required to Attend Entire Meeting. (117)

October 12, 1959

HONORABLE CHARLES J. ROSS
Clerk, Board of Supervisors of Madison County

This is in reply to your letter of October 6, 1959, which reads as follows:

“Section 15-257, Code of Virginia, provides that the attorney for the commonwealth, ‘shall be present at each and every meeting of the board and shall give his legal opinion when required by the board on all questions arising before the board.’

“The question has arisen before our board as to what constitutes being present. Does it mean full time, part time, or ten minutes?”

I enclose copy of an opinion dated July 10, 1959, which was furnished to the Honorable W. Cary Crismond, Clerk of Spotsylvania County, which relates to the duties of the commonwealth's attorney and sheriff when the board of supervisors is in session.

In my opinion, under Section 15-257 of the Code, the board of supervisors, when in session, is entitled to have the presence of the commonwealth's attorney. The attendance of the commonwealth's attorney at such meetings is one of the duties incident to his office. Whether or not the commonwealth's attorney is required to be present “full time, part time, or ten minutes” would, in my opinion, depend upon the wishes of the board of supervisors. The board of supervisors, in my judgment, would have the right to excuse the commonwealth's attorney from full time attendance at any of its meetings.

COMMONWEALTH ATTORNEYS—No Duty to Represent State in Case Removed to Federal Court. (402-A)

Attorney General—Cases Removed to Federal Court—Duty to Represent State. (402-A)

June 23, 1960

HONORABLE LEONARD F. JONES
Commonwealth's Attorney of Campbell County

This is to acknowledge receipt of your letter of June 20 in which you state
that the above case involves the prosecution of a mail carrier for an infraction of a traffic law (misdemeanor), and same has been removed from the Campbell County Court to the Lynchburg Division of the United States District Court for the Western District of Virginia pursuant to Title 28, Section 1442 United States Code. You ask whether or not it is your duty as Commonwealth’s Attorney to prosecute this case in the Federal Court.

This office has heretofore ruled that there is no duty on the part of a Commonwealth’s Attorney to prosecute a misdemeanor in a trial justice court, but when the case is appealed to the circuit court and information concerning the same has been furnished the Commonwealth’s Attorney, it is his duty to prosecute the case (see Annual Report of the Attorney General of Virginia, 1949-1950, Pages 60 and 61). Section 2-91 of the Code imposes upon the Attorney General the duty to represent the interest of the Commonwealth in matters before and controversies with the officers of the several departments of the United States.

I am, therefore, of the opinion that you do not have the duty to prosecute this case in the United States District Court. However, should you care to do so, I shall be glad to give you the required authority and pay you a reasonable fee for your services.

COMMONWEALTH ATTORNEYS—Sale of Real Estate to County—Statutory Procedure. (287)

March 22, 1960

HONORABLE FERDINAND F. CHANDLER
Commonwealth’s Attorney for Westmoreland County

This will acknowledge your letter of March 17, 1960, in which you state that the school board of your county desires to purchase from you a parcel of real estate and that in as much as you are Commonwealth’s Attorney of your county, you ask my advice as to whether or not there is any legal way the school board may acquire such property.

§ 15-381 of the Code, cited by you, is not applicable since this provision is found in Article 5 of Chapter 12 of the Code, which relates to counties operating under the county board form. § 15-504 is the applicable section. Your attention is called to § 15-504.2, which was enacted at the 1958 session of the General Assembly. Under this section the sale of the property may be made in accordance with the provisions of the third paragraph of § 15-333 of the Code as amended by Chapter 436 of the Acts of 1958. You will note that this provides that in such cases the sale and the terms thereof must be approved in advance by unanimous vote of all the members of the governing body of the county and that the names of the members so approving shall be spread on the minutes of the governing body, and that the transaction must be approved by the judge of the circuit court of the county. The statute, you will note, does not provide that the sale may be approved by unanimous vote of all the members of the governing body present at a meeting, and I construe it to mean that all of the members constituting the governing body must be recorded as voting in favor of the sale.

In this connection, I enclose copy of an opinion relating to the same subject addressed to the Honorable A. D. Johnson, Commonwealth’s Attorney of Isle of Wight county and dated December 17, 1959.
CONDITIONAL SALES CONTRACT—Lease on Construction Equipment With Option to Purchase—May be Recorded. (374)
Clerks—Recordation—Conditional Sales Contract on Construction Equipment Contained in Lease. (374)

June 7, 1960

HONORABLE LLOYD E. CURRIN, Clerk
Circuit Court of Smyth County

This letter is in answer to your inquiry concerning whether certain documents providing for the lease of construction equipment and containing an option to purchase within ninety days are to be deemed a conditional sales contract or a lease for recordation purposes.

Inasmuch as the documents without any doubt purport to be a lease of personal property and contain an option to purchase by the lessee, I am of the opinion that they are to be recorded under the provisions of Section 58-58 of the Code of Virginia. This is because 55-88 of the Code of Virginia provides, *inter alia,* that:

"Provided that any document which on its face purports to be a lease of goods and chattels and which contains an option to purchase by the lessee shall be recorded as a lease regardless of the conditions found in the document and regardless of the true intent and effect of the document."

Prior to 1958, there was doubt as to whether such documents were, for recordation purposes, a conditional sales contract or a lease, and the General Assembly, at its 1958 session, added the above provision to Section 55-88 to clarify this ambiguity.

Enclosed are the documents referred to herein, which I assume you wish returned.

CONSTITUTIONAL LAW—Staggered Terms For Members of County Board of Supervisors—Statute Must Provide For Complete Form of County Government. (224-A)

February 1, 1960

HONORABLE CURRY CARTER
Member of the Senate

This is in reply to your letter of January 28, 1960, which reads as follows:

"The Board of Supervisors of Augusta County has requested legislation that would enable the County to stagger its elections for members of the Board of Supervisors. This request has been transmitted to the Division of Statutory Research and Drafting and the Director of that Division has written me that in his opinion Section 110 of the Constitution would have to be amended to accomplish this, and has suggested that I obtain your opinion concerning this matter."

"I should appreciate it if you would advise me whether or not in your opinion it is possible for the Board of Supervisors to be elected on a staggered system without an amendment to Section 110 of the Constitution. If in your opinion this can be done without an amendment to Section 110 of the Constitution, I should appreciate it, if you would suggest what would be the nature of such a statute."
Article VII of the State Constitution relates to the organization and government of counties. Section 112, contained in this Article, provides for the election of county and district officers, and, under this section, members of the boards of supervisors are elected for four year terms. The terminal paragraph of Section 110, also contained in Article VII, reads as follows:

"Notwithstanding the provisions of this article, the General Assembly may, by general law, provide for complete forms of county organization and government different from that provided for in this article, to become effective in any county when submitted to the qualified voters thereof in an election held for such purpose and approved by a majority of those voting thereon." (Emphasis supplied)

Our Supreme Court, in the case of Lipscomb v. Nuckols, 161 Va. 936, 172 S. E. 886, has held that this paragraph in Section 110 modifies Section 112.

Chapter 12 of Title 15 of the Code, contains alternate forms of government which may be adopted by the several counties by following the procedures therein set forth. Each alternate plan or form of county government permitted under the provisions of Chapter 12 is deemed to be a complete plan or form of county government.

As I understand your letter, you have in mind a request from some of your constituents that an amendment to the Code of Virginia be enacted providing for the election of members of the board of supervisors in certain counties on a staggered basis, which would require, in the first election thereunder, that some members be elected for a term less than four years.

Any general law that would authorize such procedure without establishing a complete alternate form of government would, in my opinion, be contrary to the provisions of the Constitution. Such a change as you contemplate would not, in my opinion, be a provision for a complete form of county organization and government different from that provided for in Article VII of the Constitution.

COSTS—Criminal Case—Not Proper to Tax Against Defendant Charged but Not Convicted of Operating Motor Vehicle without License. (309)

April 13, 1960

HONORABLE D. R. TAYLOR, Judge
County Court of James City County

This is to acknowledge receipt of your letter of April 8, 1960 in which you state in part:

"As County Judge of James City County, a number of inquiries have been made to this Court concerning the appropriateness of charging costs in a case where an accused appears before the Court charged with no operator's permit and produces a valid operator's permit at the time of trial. Is it appropriate to assess costs in this case?"

Your attention is invited to Section 46.1-7 (d) of the Code, which reads as follows:

"Every person licensed by the Division as an operator and every person licensed by the Division as a chauffeur or issued a temporary instruction or driver's permit who fails to carry his license or permit and the registration card for the vehicle which he operates shall be guilty of a misdemeanor and upon conviction punished by a fine of not less
than one dollar nor more than ten dollars provided, however, if any
person, when summoned to appear before a court for failure to dis-
play his license, permit, or the registration card, upon such demand
being made of him, shall present to the officer making such demand
before the return date of the summons a proper license or permit
duly issued to him prior to the time of such demand or a proper
registration card, as the case may be, or shall appear pursuant to such
summons and produce before the court a proper license or permit duly
issued to him prior to the time of such demand or a proper registra-
tion card, as the case may be, he shall be deemed to have complied with
the provisions of this section.” (Italics supplied)

It is my opinion that if the accused exhibits to the court a driving license
or permit issued prior to the time the officer made his demand upon the accused
to exhibit same, then the accused should be found “not guilty of the charge”
and no cost should be assessed against him.

COSTS—Limitation on Collection—20 Years from Date of Judgment. (96)

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

This is in reply to your letter of September 18, 1959, which reads as follows:

“The Attorney General of Virginia rendered an opinion on July
14, 1954, in the Opinions of the Attorney General from July 1, 1954–
June 30, 1955, page 112, that action on a judgment for fine and costs
in favor of the Commonwealth after twenty years is now barred by the
Statutes of Limitations under Section 19-299 of the Code of Virginia.
“My question is this: Where a fine is not imposed but the defendant
is given a jail or penitentiary sentence which carries a judgment for
costs without a fine, is the judgment for the costs alone barred after
twenty years under Section 19-299?”

Section 19-299, to which you refer, reads as follows:

“When any statute imposes a fine, unless it be otherwise expressly
provided or would be inconsistent with the manifest intention of the
General Assembly, it shall be to the Commonwealth and recoverable
by presentment, indictment, or information. When a fine without
corporeal punishment is prescribed, the same may be recovered, if limited
to an amount not exceeding twenty dollars, by warrant, and if not so
limited, by motion for judgment under the Rules of Court. The
proceedings shall be in the name of the Commonwealth. No action,
suit or proceeding of any nature, however, shall be brought or had
for the recovery of a fine or costs due the Commonwealth or any
political subdivision thereof, unless within twenty years from the date
of the judgment imposing the fine.”

Under the underscored language it might have been true that a judgment
for costs only where no fine had been imposed would not have been subject
to the limitation of twenty years. However, this matter has now been settled
by virtue of the amendments made to Sections 8-35, 8-396 and 8-397 of the
Code by Chapter 221, Acts of 1958. Under these sections, it is clear that no
action, suit or other proceedings of any nature shall be brought for the re-
cover of costs unless such action is commenced within twenty years from the
date of the judgment for costs.
COUNTIES—Annexation—Urban Form of County Government Not Protection Against Annexation by City. (343)

May 10, 1960

HONORABLE JOHN C. WEBB
Member House of Delegates

This will reply to your letter of May 5, 1960, in which you point out that the General Assembly of Virginia, at its regular session of 1960, made provision for the adoption of an urban county form of government by various counties of the Commonwealth. Chapter 382, Acts of Assembly (1960); Chapter 12.1, Title 15, Code of Virginia (1950) as amended, Section 15-384.10 et seq. You inquire whether or not a county “adopting such a form of government would thereby gain additional protection against annexation because of this legislative recognition of the urban nature of some of our counties.”

I do not believe that any county which adopts one of the urban county forms of government in question would thereby gain any additional protection against annexation which is not specifically conferred by the legislation under consideration. While it does not appear that this legislation contains any specific prohibition against annexation of portions of those counties which adopt an urban county form of government, Sections 15-384.71 through 15-384.73 do provide for the dissolution of town charters upon referendum, prohibit the incorporation of any unincorporated community within such counties and authorize a city “contiguous to or within the limits of” such a county to become a part of the county by petition, resolution and referendum.

COUNTIES—Annexation—When County Protected Against. (347)

May 11, 1960

HONORABLE JOHN C. WEBB
Member House of Delegates

This will reply to your letter of May 6, 1960, in which you advise that the Board of Supervisors of Fairfax County anticipates that the United States census which is currently being conducted will establish that Fairfax County has a population of more than 500 inhabitants per square mile. In this connection, you present the following inquiries which will be answered in the order stated:

1. Assuming such population density, could Fairfax County adopt either of the forms of government set forth in Articles 2 and 3, Chapter 12 of Title 15 of the Code of Virginia? The applicability section apparently being 15-345.

2. Assuming Fairfax County adopts one of the above forms of government, would it be protected against a partial annexation by 15-358?

Section 15-345 of the Code of Virginia (1950) provides:

"Subject to the election hereinafter provided, the provisions of articles 1, 2, 3 and 4 of this chapter shall be applicable to any county having a population of five hundred inhabitants or more to the square mile, as shown by the last United States census, and to any county having less than sixty square miles of high land. Subject to the approval of a majority of the qualified voters of any such county who vote thereon, either of the two forms of county organization and govern-
The statute prescribes that—subject to the specified election—the provisions of Articles 2 and 3 of Chapter 12, Title 15, of the Virginia Code shall be applicable to (1) those counties having a population of five hundred inhabitants or more to the square mile, as shown by the last United States census, and (2) those counties having less than sixty square miles of high land. The statute further prescribes that any county embraced within either of these two classifications may adopt one of the two forms of county organization and government provided for in such articles. I am, therefore, of the opinion that Fairfax County—if officially determined to have a population of more than 500 inhabitants per square mile by the 1960 United States census—may adopt either of the forms of county organization and government authorized by the articles in question.

Section 15-358 of the Code of Virginia (1950) prescribes:

"When a county has once adopted one of the forms of government provided for in articles 2 and 3 of this chapter, thereafter no part of its territory may be annexed by any city unless the whole county be annexed. In such latter case the county shall not be annexed until the question of annexation has been first submitted to a referendum of the voters of such county and approved by a majority of those voting thereon.

"The foregoing provisions of this section shall not apply to any county in Virginia having an area of more than forty and of less than sixty square miles of high land and a population, according to the last preceding United States census, of less than six hundred inhabitants per square mile. For the purpose of this section, the term 'high land' in any county means the land therein above the low water line or mark of waters within and adjacent to the boundaries of such county."

This statute, in effect, prohibits the partial annexation of any county which has adopted one of the forms of government prescribed in Articles 2 and 3, unless such county has an area of more than 40 and less than 60 square miles of high land and a population of less than 600 inhabitants per square mile as shown by the last preceding United States census. Since Fairfax County does not have an area of more than 40 and less than 60 square miles of high land, it would not fall within the classification excluded from partial annexation protection by the terminal paragraph of the statute in question. I am, therefore, of the opinion that Fairfax County—if it should adopt one of the forms of government authorized by Articles 2 and 3—would be protected against partial annexation by Section 15-358 of the Virginia Code.
Question (b) is as follows:

"In creating a complete form of county government under Section 110 of the Constitution, could the right of annexation now held by existing towns be curtailed or abolished?"

Mr. Keith refers to Section 15-358 of the Code of Virginia and to the following cases: Henrico County v. Richmond, 177 Va. 754; Alexandria v. Fairfax, 193 Va. 82; and Newport News v. Elizabeth City County, 189 Va. 825.

Section 15-358 of the Code is as follows:

"When a county has once adopted one of the forms of government provided for in articles 2 and 3 of this chapter, thereafter no part of its territory may be annexed by any city unless the whole county be annexed. In such latter case the county shall not be annexed until the question of annexation has been first submitted to a referendum of the voters of such county and approved by a majority of those voting thereon.

"The foregoing provisions of this section shall not apply to any county in Virginia having an area of more than forty and of less than sixty square miles of high land and a population, according to the last preceding United States census, of less than six hundred inhabitants per square mile. For the purpose of this section, the term 'high land' in any county means the land therein above the low water line or mark of waters within and adjacent to the boundaries of such county."

In the Henrico case the city of Richmond was seeking to annex a portion of the county of Henrico and certain intervenors moved to dismiss the proceeding because of Section 15-358, which provides that when a county adopts one of the forms of government mentioned therein no part of its territory can be annexed unless the annexation includes the whole of the county and then only after the approval of such annexation by the voters. It was alleged that Henrico County had adopted one of the forms of government referred to in Section 15-358 and that the city of Richmond could not annex a part of the county. The court stated, however, that Henrico County did not come within the provisions of Section 15-358 because the application of the provisions of the Act (Chapter 167, Acts of 1930) were expressly limited "to any county having a population of 500 inhabitants or more to the square mile, as shown by the last United States census." The Court said that the Act was designed to apply to Arlington County. The Court then made this statement:

"To adopt the view of the intervenors would lead to even more serious consequences. Suppose Augusta county, one of the largest in the State, were to adopt one of the forms of government prescribed in the 1932 Act, then the city of Staunton could enlarge its boundaries only by annexing that county as a whole. Suppose Pittsylvania county should adopt a similar form of government under this act, could the Legislature have intended that the city of Danville, the population of which increased nearly 50% in the last ten years, may expand only by annexing the whole of that county?

"Suppose all of the counties in the State should adopt one of the prescribed forms of government under the 1932 Act, could the General Assembly have intended that then all cities in the State would be frozen in their limits and denied the right of expansion by reason of the imposition of terms impossible to be performed?

"In Board of Supervisors of Norfolk County v. Duke, 113 Va. 94, 99, 73 S. E. 456, this court, speaking through Judge Keith, said: 'In passing section 1014-a (of Pollard's Code of 1904, Michie's Code of 1936, §§
2956ff) the legislature was obeying the mandate of the Constitution, which requires it to "provide by general laws for the extension and contraction, from time to time, of the corporate limits of cities and towns, and no special act for such purpose shall be valid." (Constitution, § 126.)

"If we adopt the argument of these interveners we would be met with the question as to whether the imposition of such restrictions on the expansion of the boundaries of cities was a compliance with this constitutional mandate or in contravention thereof.

"But this question we do not have to decide, for it is inconceivable to us that the General Assembly would have effected so radical a change in its settled policy of annexation by mere implication,—by placing these two acts in the same chapter of the Code and thereby incorporating by inference into the 1932 Act this restriction found in the 1930 Act and concededly designed to apply to the situation in Arlington county alone.

"The logical and reasonable place to find an indication of such a radical change in the legislative policy would, of course, be in an appropriate amendment to the annexation statutes themselves (Code, §§ 2956ff). There no such change is indicated."

The Court likewise did not pass upon the constitutionality of this section in the Fairfax case.

The case of Newport News v. Elizabeth City County, 189 Va. 825, involved an amendment to the annexation statutes of Virginia. This case had under consideration Chapter 22 of the Acts of 1938 amending Section 2968 of the Code, which Act has since been repealed, and a new provision, broader in scope, is now contained in Article 1, Chapter 8, Title 15, relating to annexation. The pertinent portion thereof is now Section 15-152.26 of the Code, and provides as follows:

"Whenever, as the result of any annexation proceedings the area remaining in a county would, after annexation of the territory sought, be reduced below sixty square miles, or shall, otherwise, be insufficient in area, population, or sources of revenue, adequately to support the county government and schools, the annexation shall not be decreed unless the whole county be annexed."

This statute applies to all the counties in the State. Section 2968, at the time it was considered by the Court in the Newport News case, was contained in Chapter 120 of the Code of 1942, which Chapter was the general law relating to the extension and contraction of corporate limits of cities and towns.

This amendment by Chapter 22, Acts of 1938, provided that in any annexation proceedings there must remain at least as much as sixty square miles of unannexed territory, and repealed an amendment to Section 2968 which had been made Chapter 211, Acts of 1930 which provided that "In any county having an area of less than thirty square miles no portion thereof shall be annexed to any city or town unless the county be annexed as a whole."

The Court held that Section 2968 was a general law with respect to annexation and the case is in accord with the statement contained in our letter of June 17th to the effect that "* * * general laws curtailing the right of annexation of existing towns may be enacted * * * ."

The Newport News case referred to Section 61 of the State Constitution which we failed to mention in our opinion of June 17th. This section of the Constitution is as follows:

"No new county shall be formed with an area of less than six hundred square miles; nor shall the county or counties from which it is formed
be reduced below that area; nor shall any county be reduced in population below eight thousand. But any county, the length of which is three times its mean breadth, or which exceeds fifty miles in length, may be divided at the discretion of the General Assembly.

"The General Assembly may provide for the consolidation of existing counties on a vote of a majority of the qualified voters of each of such counties voting at an election held for that purpose."

In connection with this section, the Court said:

"The Constitution itself in section 61 fixes a limitation both upon the area and population below which a county may not be reduced, under circumstances mentioned, regardless of the needs or necessity of any city, town or other county."

We feel that our conclusion with respect to question (b) as stated in our letter of June 17th is a correct interpretation of the law.

In your letter of June 4th you framed question (d) as follows:

"Under present law, could the incorporation of new towns or cities in Fairfax County be prohibited by statutory enactment, or would Constitutional amendments be necessary?"

Mr. Keith has presented the question in different form, as follows:

"In a general act providing for additional forms of county government, does the General Assembly have the authority to limit or forbid the creation of new municipalities?"

I am of the opinion that a general law providing for additional forms of county government which would forbid the creation of new municipalities in certain counties merely because such counties have adopted a particular form of government would be in violation of Section 117 of the Constitution.

However, the General Assembly may prescribe different limitations, so long as they are applicable to all counties meeting a reasonable classification. In my opinion, while limitations may not be made to depend solely on the form of county government, they may be imposed upon some reasonable basis, such as population, etc. I am, therefore, of the opinion that if a general act providing for additional forms of county government upon some reasonable basis were enacted, such law could forbid the creation of new municipalities in counties coming within the classification established.

COUNTIES—Appropriations—Legal Expenses of Case to Which County Not a Party—May Not be Appropriated Unless §§ 15-13.1 or 15-13.2 Applicable. (301)

HONORABLE D. CARLETON MAYES
Commonwealth's Attorney for Dinwiddie County

April 6, 1960

This is in reply to your letter of April 4, 1960, which reads as follows:

"Please advise me as to your opinion on the following question:

"We have been asked to donate to the legal expenses involved in the case of Hanover County v. Town of Ashland automobile license tax
case. There is some doubt in my mind whether our Board of Supervisors can legally do this and for that reason I am asking your opinion."

I am of opinion the governing body of a county does not have general authority to appropriate funds to aid in financing litigation in which such county is not a party.

It seems, however, that such aid would be proper in cases where the counties involved have formed an alliance under § 15-13.1 or § 15-13.2 of the Code of Virginia.

COUNTRIES—Appropriation—Public Schools—Control of Governing Body Over, (373)
Schools—School Boards—Appropriations—Extent of Control of Expenditures.
(373)

June 3, 1960

HONORABLE C. HARRISON MANN, JR.
Member, House of Delegates

This is in reply to your letter of May 24, which reads as follows:

"Several matters relating to annual appropriations for public schools have arisen under Chapter 8 of Title 22 of the Code of Virginia. In order to clarify these questions I would appreciate an opinion from your office with respect to the following:

"When the County Board of Arlington County considers the estimate of the amount of monies deemed by the School Board to be needed for the public schools of the County for the coming fiscal year.

"(1) May the County Board make a lump sum appropriation for the estimate of the amount of money deemed to be needed for support of public schools for overhead charges, for instruction, for operation, for maintenance, for a reserve fund to purchase new school buses to replace obsolete or worn out equipment, for auxiliary agencies, for miscellaneous and for permanent capitalization and such other heading or items as may be necessary?

"(2) May the County Board make appropriations by individual categories as set forth in the budget estimate submitted by the School Board?

"(3) Is it the intent of the Legislative Acts that appropriations by the County Board may be made either as a lump sum or by categories at the discretion of the County Board?

"(4) Is it the intent of the Legislative Acts that the County Board should make appropriations for school purposes by individual categories rather than as a lump sum?

"(5) May the County Board add or subtract categories to the categories as submitted by the School Board?

"(6) Does the county Board have the authority to increase or decrease specific categories of the budget as submitted by the School Board in making an appropriation either by a lump sum or by categories?

"(7) If an appropriation is made on a lump sum basis, may
the County Treasurer honor warrants drawn against the appropriated monies without more detailed appropriations by categories?

"(8) May the County Treasurer pay warrants drawn on funds derived from a bond referendum for school construction without specific appropriations by the County Board?

"(9) May the County Treasurer pay warrants drawn against school funds received by the School Board for school construction purposes from the Federal Government without appropriation by the County Board?

"(10) May the County Treasurer pay warrants against a central school cafeteria fund, established by the School Board, monies for which are received from the sale of school lunches to students and from Federal sources without an appropriation by the County Board?

"In considering the above wherever the term 'lump sum' appears it is used in the sense of a single appropriation for support of public schools of the County. (See Sec. 22-120.3). Wherever the word 'category' appears it is used to indicate specific, separate functions, such as overhead charges, instruction, operation, etc. (See Sec. 22-120.5)."

The answers to these questions depend upon the interpretation of Sections 15-575, 15-576 and 15-577 and the provisions of Chapter 8, Title 22 of the Code. Any consideration of these questions must be in light of the historical background of the several legislative enactments amending the statutes pertaining to local budgets for public school purposes.

The basic purpose of these amendments, especially those made at the 1959 Extra Session of the General Assembly, was to extend to the governing bodies of the localities a more firm control over all expenditures of the revenues of the localities subject to appropriation.

Sections 22-120.3 to 22-120.5, inclusive, relate to the duties of the division superintendent of schools, with the advice of the local school board, and the governing body, with respect to the preparation of an estimate of the amount of money deemed by the school board to be needed for public schools, or in the alternative, an estimate of the amount of money needed for educational purposes. It is clear from a close examination of Section 22-120.5 that the governing body may, in its discretion, require both estimates from the division superintendent and the school board.

The estimate for public school purposes "shall set up the amount of money deemed to be needed for overhead charges, for instruction, for operation, for maintenance, for reserve fund to purchase new school buses, to replace obsolete or worn out equipment, for auxiliary agencies, for miscellaneous and for permanent capitalization and such other headings or items as may be necessary." Section 22-120.5.

The alternative estimate, if required by the local governing body "of the amount of money deemed to be needed for educational purposes shall show the number of children who reside in the county between the ages of six and twenty years multiplied by the expected average cost per child to the county and a sum sufficient for debt service." Section 22-120.5.

Under Section 15-575 the estimates referred to in Title 22 must be filed with the governing body within the time therein required. After the estimate has been received, the governing body "shall prepare a budget for informative and fiscal planning purposes only, containing a complete itemized and classified plan of all contemplated expenditures" and, in addition, "all estimated revenues and borrowings for the locality or any subdivision thereof for the ensuing fiscal year."
Section 15-576 of the Code contains the following requirements with respect as to what the budget shall show. This section reads as follows:

"Opposite each item of the contemplated expenditures the budget shall show in separate parallel columns the aggregate amount appropriated during the preceding fiscal year, the amount expended during that year, the aggregate amount appropriated and expected to be appropriated during the current fiscal year, and the increases or decreases in the contemplated expenditures for the ensuing year as compared with the aggregate amount appropriated or expected to be appropriated for the current year. This budget shall be accompanied by:

(1) A statement of the contemplated revenue and disbursements, liabilities, reserves and surplus or deficit of the county, city or town as of the date of the preparation of the budget.

(2) An itemized and complete financial balance sheet for the locality at the close of the last preceding fiscal year."

The wording of this section is clear and free from ambiguity and leaves no doubt that the budget must be itemized in accordance with the requirements of the sections of the Code previously discussed herein.

Section 15-577 of the Code relates to the publication of the proposed budget, hearings, etc. This section reads as follows:

"For informative and fiscal planning purposes only a brief synopsis of the budget shall be published in a newspaper having general circulation in the locality affected, and notice given of one or more public hearings, at least seven days prior to the date set for hearing, at which any citizen of the locality shall have the right to attend and state his views thereon. The board of supervisors of any county not having a newspaper of general circulation may in lieu of the foregoing notice provide for notice by written or printed handbills, posted at such places as it may direct. The hearing shall be held at least seven days prior to the beginning of the fiscal year; provided that the governing body may recess or adjourn from day to day or time to time during such hearing. The fact of such notice and hearing shall be entered of record in the minute book.

"The contemplated expenditure for all purposes as contained in the budget prepared under §§ 15-575 and 15-576 and published under this section shall be for informative and fiscal planning purposes only and shall not be deemed to be an appropriation. No money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the board, council or other governing body." (Italics supplied.)

This section does not require the published notice of the proposed budget to show a detailed itemized breakdown of the proposed expenditures, but a brief synopsis is all that is required to be published.

It is expressly provided in Section 15-577 that "the contemplated expenditure for all purposes as contained in the budget prepared under Sections 15-575 and 15-576 and published under this section shall be for informative and fiscal planning purposes only and shall not be deemed to be an appropriation. It is further provided in this section that "no money shall be paid out or become available to be paid out for any contemplated expenditure unless and until there has first been made an annual, semiannual, quarterly or monthly appropriation for such contemplated expenditure by the ** governing body."

Section 22-72 relates to the powers and duties of a school board. Pertinent to this opinion is the following:
§ 22-72: "The school board shall have the following powers and duties:

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"(9) Costs and expenses.—In general, to incur costs and expenses, but only the costs and expenses of such items as are provided for in its estimates submitted to the tax levying body without the consent of the tax levying body."

Prior to the 1959 amendment (Chapter 79, Extra Session 1959), the underscored words were not contained in this section, but the word "budget" appeared.

This provision was construed in the Board of Supervisors v. School Board, 182 Va. p. 266, at page 278, as follows:

"Section 656 provides that 'The school board shall have authority and it shall be the duty of the school board * * * in general, to incur such costs and expenses, but only such costs and expenses as are provided for in its budget without the consent of the tax levying body; * * *'

"Under this last quoted section, I am, of opinion that 'its budget' refers to the estimate submitted by the school board to the board of supervisors. If the school board wanted to expend money for purposes not set up in its estimate, then it would be required to get the consent of the tax levying body."

In addition to the statutes already cited, attention is directed to Section 58-839 of the Code, and especially to the terminal paragraph of this section, which reads as follows:

"The making of a general county levy or the imposition of other taxes or the collection of such levy or taxes shall not constitute an appropriation nor an obligation or duty to appropriate any funds by the board of supervisors or other governing body of any county for any purpose, expenditure or contemplated expenditure. The laying or making of a levy in an amount sufficient to cover or pay all estimated and contemplated expenditures for the fiscal year shall not be construed as imposing any obligation or duty on the board of supervisors or other governing body to appropriate any amount whatsoever. No part of the funds raised by the general county levies or taxes shall be considered available, allocated or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the board of supervisors or other governing body either annually, semiannually, quarterly, or monthly. There shall be no mandatory duty upon the board of supervisors or other governing body of any county to appropriate any funds raised by general county levies or taxes except to pay the principal and interest on bonds and other legal obligations of the county or district and to pay obligations of the county or its agencies and departments arising under contracts executed or approved by the board of supervisors or other governing body, unless otherwise specifically provided by statute. Any funds collected and not expended in any fiscal year shall be carried over to the succeeding fiscal years and shall be available for appropriation for any governmental purposes in those years."

The provisions of this section prohibit the expenditure of funds raised by a general levy except for purposes for which funds have been appropriated.

In light of the statutes cited herein, I shall answer your questions in the order stated.
(1): In my opinion, the county board may make a lump sum appropriation—for example:

For public school purposes...........................................$9,000,000.00

Under this language, due to the provisions of Section 22-72(9) the school board would be bound by the separate items, categories and purposes set forth in its estimate. It could not vary from the structure of the estimate without the consent of the county board.

However, the county board, in making its appropriation, could add appropriate language so as to give its prior consent to the school board to disregard the breakdown of proposed expenditures contained in the estimate and to expend the total appropriation, within the limit of its total, for public school purposes, shifting and transferring moneys from one item or purpose to another, without further consent from the county board.

(2): This question is answered in the affirmative. In such case, the school board could not vary from the specific categories without the consent of the county board.

(3) and (4): These questions are answered together. The intent of the General Assembly with respect to a legislative act is not always apparent from the language of the act itself. The statutes, in my judgment, show a clear legislative intent to place in the hands of the local governing body the power to control and supervise all expenditures for governmental purposes. The power of the governing body to require a breakdown of the school expenses and to control such expenses by its appropriation authority is implicit in the language of the various amendments made in the Special Session of 1959. It may be assumed, in the light of the historical background of the legislation pertaining to school finances, that the General Assembly in delegating these powers to the localities, expected these powers to be exercised in the discretion of the governing body, if and when, such was necessary or expedient.

(5) and (6): These questions are answered together. The county board, having been vested with complete control over appropriations, under Section 58-839 of the Code has the power to determine the purpose and the amount of any appropriation, subject to this provision:

“There shall be no mandatory duty upon the board of supervisors or other governing body of any county to appropriate any funds raised by general county levies or taxes except to pay the principal and interest on bonds and other legal obligations of the county or district and to pay obligations of the county or its agencies and departments arising under contracts executed or approved by the board of supervisors or other governing body, unless otherwise specifically provided by statute.”

(7): If the county board makes a lump sum appropriation and includes in its resolution making such appropriation language broad enough to meet the requirements of the terminal sentence of Section 15-577, such will be sufficient. The treasurer must for his own protection be satisfied that (1) the money has been appropriated to the school board in such language that there can be no question as to the treasurer's right to honor the school warrant and (2) the treasurer must know that there is available to the credit of the school fund moneys for the payment of the warrant. Sections 15-256, 22-77 and 58-921 of the Code.

(8): This is a public fund, and hence it is subject to the appropriation powers of the county board. It will be observed that one of the items required to be set forth in the estimated budget under Section 15-575 is “borrowings for the locality.” This type of fund, therefore, becomes subject to the appropriation provisions of Section 15-577 of the Code.

(9): The answer to (8) is applicable to this question. Therefore, the answer is in the negative.
(10): Where the school board establishes and operates a school cafeteria, the obligations of the cafeteria become obligations of the school board. Therefore, the funds received from this source should be contained in the estimate, as well as the statement required by Section 15-376(1) and may not be expended except upon proper appropriation by the county board.

COUNTIES—Boards of Supervisors—Appropriations for Partial Payment of Costs of Maintenance of Police and Fire Radio Dispatcher Service—May Share Costs With Town. (300)

April 4, 1960

HONORABLE J. W. WADDILL
Chairman of the Board of Supervisors of Lunenburg County

This is in reply to your letter of March 30, 1960, which reads as follows:

“At the regular March, 1960, meeting of the Board of Supervisors of Lunenburg County a motion was adopted whereby the County of Lunenburg agreed to appropriate the sum of $1500.00 for the purpose of paying one-third of the cost of a full-time police and fire radio dispatcher service in connection with the Town of Victoria provided this may be legally done. A copy of this motion is attached hereto.

“Under the proposed arrangement the Town of Victoria would provide the radio, all expense of maintaining a properly equipped building free of cost to the County. The Town of Victoria has agreed to maintain the radio dispatcher service on a 24-hour basis seven days per week and pay all salaries of two dispatchers.

“The motion was not passed primarily for the benefit of the Town of Victoria but for the purpose of having the radio dispatcher service available at all times to the Sheriff of Lunenburg County and his deputies.

“We ask your opinion as to whether the motion sets forth that which may be legally done. If this can be legally done, would it be necessary for the Sheriff to have an additional deputy or for a special police officer to be appointed? Or is it legal for the County to purchase full-time radio dispatcher service for the Sheriff and his present deputies? If the latter can be legally done, is it legal for a check to be drawn in payment for the service payable to the Treasurer of the Town of Victoria?”

The resolution passed by the board of supervisors referred to in your letter is as follows:

“At a regular meeting of the Board of Supervisors of Lunenburg County, Virginia held at the Courthouse thereof on Friday, the 11th day of March, 1960:

“On motion of Mr. Charles R. Arvin, seconded by Mr. H. C. Ragsdale the Board agreed to appropriate the sum of $1500 for the purpose of paying one-third (1/3) of the cost of a full time police and fire radio dispatcher service in connection with the Town of Victoria.”
Victoria provided this may be legally done. It being understood that the Town of Victoria would provide the radio, all the expense of maintaining a properly equipped building and all salaries of two dispatchers with the County of Lunenburg furnishing the salary of one dispatcher not to exceed the sum of $1500.00."

The resolution provides for an appropriation of money from the general fund of the county. The main question presented is whether or not the board of supervisors of Lunenburg County may make an appropriation from its general fund, not otherwise appropriated, for the purpose of sharing with the town of Victoria certain expenses in connection with the operations of a police radio broadcasting facility owned by the town of Victoria by means of which various police officers may be alerted and advised of situations which require the immediate attention of the police department. The county of Lunenburg, in the exercise of its police powers, operates and maintains certain police cars manned by the sheriff or his deputies.

The town of Victoria is located within the county of Lunenburg and, therefore, the jurisdiction of the law enforcement officers of the county includes the territorial limits of the town of Victoria. The law enforcement officers of the county are charged with the duty of enforcing the criminal statutes of the State throughout the county.

§ 15-8(5) of the Code of Virginia authorizes the board of supervisors of a county "To adopt such measures as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective counties, not inconsistent with the general laws of this State."

Any appropriation made by the board of supervisors for the purpose of promoting the safety of the inhabitants of a county is a valid appropriation. It is within the power of the board of supervisors to determine what measures are necessary to protect the people of its jurisdiction from criminal acts and to apprehend persons who have committed crimes within the county. If, in the judgment of the board of supervisors of the county, the joint use of the broadcasting facility will be in the interest of the public safety, then the board of supervisors may make an appropriation from the public fund for the purpose of operating and maintaining such a facility, even though the facility may be owned by the town of Victoria.

Based upon this section—which was formerly § 2743 of the Code—former Attorney General Staples held that it was a proper expenditure by the board of supervisors of Augusta county to make a contribution towards the purchase of uniforms for a Company of the Virginia Protective Force. This opinion is found in the Report of the Attorney General for 1940-'41 at page 16. In another opinion found in the Report of Attorney General for 1942-'43, at page 16, Attorney General Staples ruled that the board of supervisors of Nottoway county could make an appropriation to buy uniforms for a Company of the Virginia Reserve Militia organized at Crewe, Virginia.

In another opinion reported in Report of Attorney General for 1945-'46, at page 13, Mr. Staples held that the board of supervisors of Isle of Wight county could make a monetary contribution to Company 23 of the Virginia State Guard located in the town of Franklin, which is in Southampton county, although some of the members of the Company were residents of Isle of Wight county and the Company was so organized as to be utilized in the territory of Isle of Wight county in case a necessity should arise.

In my opinion, the board of supervisors of Lunenburg county clearly has the power to make the appropriation which is the subject of this inquiry.

With specific reference to the three questions contained in the last paragraph of your letter, I am of opinion each of these questions must be answered in the affirmative.
COUNTIES—Boards of Supervisors—Control of Expenditure of Funds by County School Board. (295)
Schools—School Boards—Control Over Expenditure of Sums Appropriated For School Purposes. (295)

April 1, 1960

HONORABLE DUNCAN M. BYRD
Commonwealth's Attorney for Bath County

This is in reply to your telegram of April 1, 1960, in which you request my opinion as to what control the board of supervisors may exercise over the expenditure of funds by the county school board.

On March 23, 1960, we furnished an opinion to Honorable C. Fred Bailey, member of the board of supervisors for Isle of Wight county, which relates to the same subject matter. I am enclosing copy of this opinion.

Sections 15-575 through 15-577 of the Code relating to budgets specifically provide that the estimates filed by the school boards and all other departments of a county are for informative and fiscal planning purposes only and that the adoption of a budget under these sections does not constitute an appropriation for the purposes set forth in the budget. Under the provisions of Section 58-839 of the Code it is provided:

"The making of a general county levy or the imposition of other taxes or the collection of such levy or taxes shall not constitute an appropriation nor an obligation or duty to appropriate any funds by the board of supervisors or other governing body of any county for any purpose, expenditure or contemplated expenditure. The laying or making of a levy in an amount sufficient to cover or pay all estimated and contemplated expenditures for the fiscal year shall not be construed as imposing any obligation or duty on the board of supervisors or other governing body to appropriate any amount whatsoever. No part of the funds raised by the general county levies or taxes shall be considered available, allocated or expended for any purpose until there has been an appropriation of funds for that expenditure or purpose by the board of supervisors, or other governing body either annually, semiannually, quarterly, or monthly. There shall be no mandatory duty upon the board of supervisors or other governing body of any county to appropriate any funds raised by general county levies or taxes except to pay the principal and interest on bonds and other legal obligations of the county or district and to pay obligations of the county or its agencies and departments arising under contracts executed or approved by the board of supervisors or other governing body, unless otherwise specifically provided by statute. Any funds collected and not expended in any fiscal year shall be carried over to the succeeding fiscal years and shall be available for appropriation for any governmental purposes in those years."

I believe that from a close examination of these Code sections you will have no difficulty in determining that the board of supervisors has absolute control over the expenditure of county funds. Of course, whenever a board of supervisors has made an appropriation to the school board or any other department for any public purposes, then that department, unless there are some restrictive conditions attached to the appropriation, has a free hand in the expenditure of the funds so appropriated.
COUNTIES—Board of Supervisors—Firearms Ordinance—No Authority to Enact. (152)

November 13, 1959

HONORABLE WILLARD J. MOODY
Member of the House of Delegates

This is in reply to your recent letter which reads, in part, as follows:

"I am interested in obtaining your opinion as to the validity of a certain statute enacted by the County of Norfolk on October 8, 1946. This ordinance is set out on page 73 of the Ordinances of the Board of Supervisors Norfolk County Virginia and is contained in a portion of the said ordinances under the heading 'RIFLE ORDINANCE.' In Section Number 2 of this ordinance it provides as follows: 'It shall be unlawful for any person to carry any loaded firearms on any street or highway in Norfolk County, or on any public lands except those legally open for hunting, or on a properly established target shooting range, except persons authorized by law to carry loaded firearms.' Under the last paragraph of this section it provides as follows: 'Any person who shall violate any of the provisions of this ordinance shall be guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding $100.00, and any permit issued under the provisions of this ordinance shall be revoked by the Superintendent of Police of Norfolk County.'

"It appears from Section 18-147.1 of the Virginia Code of 1950, as amended, that by Acts of the General Assembly provisions have been made prohibiting the carrying of loaded firearms in certain counties under certain conditions but it does not appear that Norfolk County has been brought within any of these Acts. I further note that under these Acts of Assembly the maximum fine for violating these provisions is $50.00. Norfolk County's ordinance provides for a maximum of $100.00. Also, the provisions passed by the General Assembly make an exception if a person is acting at the time in the defense of person or property. Norfolk County makes no such exception in its ordinance."

As you point out, the General Assembly of Virginia amended and re-enacted § 18-147.1 of the Code of Virginia to make it unlawful for any person to carry or have in his possession a loaded firearm while on any part of a public highway in any county falling within one of three enumerated categories, when such person is not authorized to hunt on the private property on both sides of the highway along which he is standing or walking. Any person violating any provision of this statute is liable to a fine of not less than $10.00 nor more than $50.00. In addition, the General Assembly has adopted § 29-147.1 of the Code which authorizes the governing body in any county, which falls within the limits of any one of four specific categories, by ordinance to prohibit hunting or attempting to hunt with a firearm, any game bird or game animal while such person is hunting or attempting to hunt on or within one hundred yards of any highway within such county which is a part of the State Highway System.

As you know, counties, cities and towns are creatures of the State and the governing bodies of such political subdivisions have no power to legislate except within the limits of the authority delegated to them by the General Assembly. While it is true that §§ 15-8 and 15-10, as amended, of the Code of Virginia, vest in the boards of supervisors of the various counties to which these particular sections apply the power to adopt such measures, not inconsistent with the general laws of the State, as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective coun-
ties, nevertheless, where the State has inferentially decided, by adopting a specific prohibition effective only in certain counties, that in the remaining counties the carrying of loaded firearms on the public highways is not prohibited, then, in order for a county to have power to regulate such carrying of firearms, there must be an express grant of such power.

In short, the intent of the General Assembly appears to be that it, and it alone, shall determine in which counties the carrying of loaded firearms on the public highways is to be prohibited. For these reasons I am of the opinion that Norfolk County does not have the power to enact a valid ordinance such as that which you have set out.

In view of the foregoing, it is not necessary to answer the second question which you raise relative to the increased penalty provided for by the ordinance in question.

COUNTIES—Boards of Supervisors—Insurance—Appropriations For Premiums—Volunteer Firemen, First Aid Crews and Deputy Sheriffs. (249)

February 26, 1960

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for
Montgomery County

This is in response to your letter of February 22, 1960, in which you ask several questions which I shall answer seriatim.

"(1) Does the Board of Supervisors of the County have authority to appropriate money for insurance to cover volunteer firemen?"

The board of supervisors is authorized by § 15-16.1 of the Code of Virginia (Chapter 36, Acts of Assembly, Extra Session, 1959) to appropriate money from the county treasury to an "* * * organization furnishing volunteer fire fighting services within or without the boundaries of the county * * *"). I am of the opinion that this section is broad enough to authorize the Board of Supervisors to appropriate money to the volunteer fire department for the purpose of purchasing insurance to cover volunteer firemen.

"(2) To appropriate money for insurance covering what is known as the members of the First Aid Crews, who go along with, and participate in aiding the County volunteer firemen?"

I do not know of any statute authorizing an appropriation and expenditure of this nature. I call your attention, however, to the provisions of § 15-16.2 of the Code which authorizes the board of supervisors to pass an ordinance providing for the payment to a volunteer rescue squad a sum not to exceed $10.00 for each rescue call the squad makes for an automobile accident in which someone has been injured. If the First Aid Crew, mentioned in the above question, is in fact a volunteer rescue squad, the Board may enact such an ordinance providing for the payment mentioned.

"(3) Does the Board of Supervisors of the County have authority to reimburse Deputy Sheriffs for the difference between the cost of insurance they carry on their private passenger cars, and the cost on the amount used by said car for Deputy Sheriff purposes, provided each Deputy Sheriff presents a certificate supplied by his agent detailing both costs?"
The board of supervisors is authorized by § 14-89 of the Code to enter into an agreement, with the approval of the Compensation Board, with the sheriff or his deputies with respect to travel expenses, including the use of privately owned vehicles by such sheriff and his deputies. I am, therefore, of the opinion that the Board of Supervisors may include the cost of automobile insurance in determining the amount to be paid the Deputy Sheriffs for the use of their private automobiles on official business, provided such arrangement is first approved by the State Compensation Board.

COUNTIES—Boards of Supervisors—Meetings—Attendance of Commonwealth's Attorney Mandatory—Board May Require Attendance of Sheriff (Sheriff May Send Deputy)—Commonwealth's Attorney Determines Whether Claims Against County Just and Proper. (13)

July 10, 1959

HONORABLE W. CARY CRISMOND
Clerk, Circuit Court of
Spotsylvania County

This is in reply to your letter of July 8th, which reads as follows:

"I have been instructed by the Board of Supervisors to write you and ask the ruling on the following question:

"1. Whether it is compulsory for the Commonwealth Attorney and the Sheriff to attend all meetings of the Board of Supervisors and whether the Commonwealth Attorney is required by law to rule on the validity of any bill presented to him by the Board."

Section 15-257 of the Code contains the following language:

"The attorney for the Commonwealth shall be present at each and every meeting of the board and shall give his legal opinion when required by the board on all questions arising before the board."

Under this section it is mandatory, therefore, that the Commonwealth's Attorney to present at each and every meeting of the Board.

Section 15-244 of the Code is as follows:

"The board of supervisors shall sit with open doors and all persons conducting themselves in an orderly manner may attend its meetings. It may require the sheriff of the county or, at his option, one of his deputies, to attend its meetings and preserve order, or discharge such other duties as may be necessary to the proper dispatch of the business before it."

Under this section, the Board of Supervisors has the right to require the sheriff of the county, or, at the sheriff's option, one of his deputies, to attend its board meetings and preserve order or discharge such other duties as may be necessary to the proper dispatch of the business before the board. You will note that under this section the sheriff is not required to attend the meeting of the Board of Supervisors, but the Board of Supervisors has the right to
require the sheriff, or, in the sheriff's discretion, one of the deputies, to be present at the meeting.

With respect to the last part of your question, as to whether the Commonwealth's Attorney is required by law to rule on the validity of any bill presented to him by the Board, you will find that this matter is covered by Section 15-257 of the Code. The significant language in this section with respect to the Commonwealth's Attorney is as follows:

"The attorney for the Commonwealth shall represent the county before the board, and shall resist the allowance of any claim which is unjust or not before the board in proper form, and upon proper proof, or which for any other reason ought not to be allowed. And when any claim has been allowed by the board against the county, which, in the opinion of such attorney, is improper or unjust, or from which he shall be required to appeal by any six freeholders of the county, he shall appeal from the decision of the board to the circuit court of the county, causing a written notice of such appeal to be served on the clerk of the board and the party in whose favor the claim is allowed within thirty days after the making of such decision. Whenever any claim has been allowed by the board which is illegal, the attorney for the Commonwealth, in the name of the county, shall institute proper proceedings in the circuit court of his county within two years from the entry of the order allowing the same, if such amount has already been paid."

This language is so clear that I do not believe that it will be necessary for me to make any further comment with respect to its meaning.

COUNTIES—Boards of Supervisors—Minutes of—Should Include Brief Summary of All Questions of a Public Nature Discussed by Board—All Ordinances and Resolutions Should be Transcribed in Full. (5)

July 9, 1959

HONORABLE W. CARY CRISSMOND
Clerk, Circuit Court of
Spotsylvania County

This is in reply to your letter of July 8, 1959, which reads as follows:

"Your attention is invited to Section 15-248 of the Code of Virginia. I wish you would advise me your interpretation of the word 'complete.' Is not the Board of Supervisors the sole authority in directing what shall be and what shall not be incorporated in the Supervisor's record book?

"I know that I am required to record all proceedings that I am directed to by the Board and those on which definite action is taken by the Board, but I am wondering if it also includes the name, purpose and disposition of every matter discussed formally and informally at each meeting."

In my opinion Section 15-248 of the Code requires that the official actions of the Board shall be incorporated in the minutes. The term "minutes" as used in this section means a brief summary of what the Board has considered at the meeting. Of course, all resolutions and ordinances must be transcribed in full. I believe that the minutes should contain all questions of a public nature which
have been discussed and considered by the Board, even though a determination of such questions may have been deferred instead of being voted upon. The word "complete" as used in this section does not, in my opinion, mean that a stenographic record of the proceedings is required. While the Board is the judge of what it shall have included in the minutes, I do not feel that their judgment should be exercised in such manner as to exclude therefrom any question of official nature that has been considered by the Board.

COUNTIES—Boards of Supervisors—Office Space for County Officers—Board May Assign and Reassign. (188)

December 17, 1959

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for
Nelson County

This is in reply to your letter of December 14, 1959, which reads as follows:

"For several years the Judge of the County Court and the constitutional officers of Nelson County have occupied certain offices in the Court House building.

"At its last meeting, the Board of Supervisors ordered certain of the above to exchange offices, and one of them has refused to move from his present office in the Court House building.

"Does the Board of Supervisors of Nelson County have the power and authority to order such a move, and if the order is disregarded, what steps can the Board take to enforce the order?"

You have supplemented your letter by telephone stating that the order of the Board of Supervisors involves the Judge of the County Court and the Commissioner of the Revenue.

Section 15-689 of the Code provides as follows:

"The board of supervisors of each county or the council of each city shall, if there be offices in the courthouses of the respective counties and cities available for such purposes, provide offices for the treasurer, Commonwealth's attorney, sheriff, commissioner of the revenue, commissioner of accounts and division superintendent of schools for such county or city. And the board of supervisors of any county or the council of any city may, if there be offices in their respective courthouses available for such purposes, provide offices for the judge of any court sitting in the county or city, and any judge of the Supreme Court of Appeals who may reside in the county or city, and if such offices are not available in the courthouse, they may be provided by the board of supervisors or council, if they deem it proper, elsewhere than in the courthouse of the county or city."

Section 16.1-48 of the Code contains the following special provision with respect to an office for the County Court Judge and his clerk:

"Each county shall provide suitable quarters for the court and its clerk, and a suitable room or rooms for the sessions of the court at the places designated for such purpose, except that if the court is
held in a city or town other than the county seat such city or town shall provide a suitable place for the court to be held. Such county shall also provide all necessary furniture, filing cabinets and other equipment necessary for the efficient operation of the court."

In my opinion these statutes vest in the Board of Supervisors the authority to designate the office space which is to be occupied by the county officials in the performance of their public duties. If there is not adequate space in the courthouse to accommodate all of these officials, space must be provided in some other suitable building.

In the event any of the officials refuse to comply with any order entered by the Board of Supervisors relating to office space in the courthouse, in my opinion the matter should be brought to the attention of the Circuit Court which, in my opinion, has authority to enter an appropriate order. I understand that your Court is in continuous session from the commencement of one term to the commencement of a succeeding term. Under § 15-692 of the Code, the judge of a circuit court may control the use of the courthouse during the term of court. This question is discussed in the case of Supervisors v. Wingfield, 27 Gratt (68 Va.) 329.

July 10, 1959

HONORABLE W. CARY CRISMOND
Clerk, Circuit Court of
Spotsylvania County

This will acknowledge your letter of July 8th, which reads as follows:

"I have been instructed by the Board of Supervisors to write to you and ask the ruling on the following question:

"1. If any member of the Board or any office holder such as Treasurer may be paid by the County for visiting the Auditor of Public Accounts office to discuss with him Chapter 69 of the Virginia Code of 1950, as amended, (New Budget and Appropriation law) and if so, what expenses are allowable? If a Supervisor has to pay some one to operate his store for that day, may that amount be charged as an expense?"

Sections 14-5 and 14-5.2 of the Code are applicable. Under these sections a member of the board of supervisors is entitled to reimbursement for such of his actual expenses as are necessary and ordinarily incident to his travel when on official business for the county. If the travel was by means of his privately owned car he may be reimbursed at the rate of seven cents per mile.

We have heretofore rendered an opinion relating to this subject, copy of which I am enclosing. This opinion is published in the Attorney General Report 1954-55, at page 59.

The member would not be entitled to any expense incurred by him in connection with the hiring of a person to operate his store during his absence.
COUNTIES—Compulsory School Attendance—Form of Ordinance Putting State Law into Effect—Provisions of Act of Assembly Should Not be Spelled Out. (4)

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney
for Montgomery County

This is in reply to your letter of July 3, 1959, in which you request this office to prepare an ordinance to be enacted by the Board of Supervisors of your county so that the provisions of Chapter 72, Acts of the General Assembly, Extra Session of 1959, will be in effect in your county.

I have drawn a short ordinance which I think will be sufficient when adopted pursuant to the provisions of Section 15-8 of the Code.

I do not believe the provisions of the Act should be included in the ordinance.

Chapter 72 is the State law requiring compulsory attendance in the public and other schools. As I understand Section 24 of the Act it does not authorize a board of supervisors to pass an ordinance providing for compulsory attendance in schools. This section merely authorizes the board of supervisors, upon the recommendation of the local school board, to elect, so to speak, by ordinance adopted as local ordinances are adopted, to permit the State law to become effective in the county.

I am enclosing a copy of an opinion, dated May 11, 1959, to Honorable A. L. Philpott, Member of the House of Delegates, which relates to this subject.

AN ORDINANCE to provide that an Act designated as Chapter 72, Acts of the General Assembly of Virginia, Extra Session of 1959, providing for the compulsory attendance of children between the ages of seven and sixteen in the schools specified in said Act, shall be in effect and in force within the County of Montgomery.

WHEREAS, the School Board of Montgomery County has recommended by resolution to the Board of Supervisors that an Act designated as Chapter 72 of the Acts of the General Assembly of Virginia, Extra Session 1959, be adopted pursuant to Section 24 of said Act so that it shall be in effect and in force within the County of Montgomery; now, therefore,

BE it ordained by the Board of Supervisors of Montgomery County, Virginia, that an Act designated as Chapter 72, Acts of the General Assembly of Virginia, Extra Session 1959, providing for the compulsory attendance of children between the ages of seven and sixteen in the schools specified in said Act, shall, from and after September 1, 1959, be in effect and in force within the County of Montgomery.

COUNTIES—County Manager Form—Warrants and Checks—By Whom Issued—Delegation of Authority to Issue—Signatures Required—Single Form County Checks. (292)

HONORABLE WILLIAM F. PARKERSON, JR.
Commonwealth's Attorney for
Henrico County

This is in reply to your letter of March 15, 1960, in which you stated in part:
"We are planning the reorganization and revision of bookkeeping, auditing and checking systems for the County of Henrico with the aid of the State auditors. In this connection several questions have been raised with respect to the issuance and signing of warrants and checks.

"It is intended that through such reorganization we would have all checks from the County of Henrico, the County School Board and the Welfare Department signed by the County Manager (he being so designated by the Board of Supervisors), and countersigned by the Director of Finance, pursuant to § 15-320(e) of the Code of Virginia, and that we would have only the one form of check, whereas now we have several different forms.

"It is also intended that the authority to issue warrants be placed in each department head or in the County Manager alone. Our questions, therefore, are:

"(1) Under the County Manager form of government in Henrico County who has the authority to issue warrants for (a) general county expenditures (b) school board expenditures and (c) Welfare Department expenditures?

"(2) Can this authority be delegated to the County Manager, or if desired, to the heads of each department?

"(3) Does the proviso in § 15-253 authorize the County Manager, if so authorized by the Board of Supervisors, to issue warrants not only for general county expenditures but also School Board and Welfare Department expenditures?"

I will agree that it is desirable and legally possible that the County of Henrico have only one form of check, signed by the County Manager, if he be so authorized by the County Board of Supervisors, and countersigned by the Director of Finance. However, I cannot agree that the authority to issue warrants may be placed in each department head or in the County Manager alone.

Although § 15-10, as amended, of the Code of Virginia vests in the County of Henrico "the same powers and authority as the councils of cities and towns by virtue of the Constitution of the State of Virginia or the Acts of the General Assembly passed in pursuance thereof," this office has always been of the opinion that a "§ 15-10 county" is thereby vested only with the powers and authority given to city councils by general law and not by special charter provisions. I am aware of no general law which empowers the councils of cities and towns to place the authority to issue warrants for claims against their city or town in each department head or in the city manager alone.

The County of Henrico, as presently constituted, operates under the provisions of Article 3 of Chapter 11 of Title 15 of the Code of Virginia. It has been suggested that since §§ 15-319 and 15-324 place the county school board, the division superintendent of schools and the officers and employees thereof in the Department of Education, the other provisions of the Code applicable to school boards do not apply to the County School Board of Henrico County. Likewise, it may be argued that since §§ 15-319 and 15-322 place the County Board of Public Welfare and the Superintendent of Public Welfare in the Department of Public Welfare, the other provisions of general law applicable to county boards of public welfare do not have full force and effect.

I am constrained to believe that the plain language of § 15-324 does not justify any such interpretation, nor does the plain language of § 15-322. These sections state that the boards and officers in question shall exercise the powers conferred and perform the duties imposed by general law, except "as herein otherwise provided" or "not inconsistent herewith."

As you point out, subsections (e) and (f) of § 15-320 specify that no money shall be disbursed or paid out by the county except upon check signed by the
Chairman of the Board of Supervisors, or such other person as may be designated by the Board, and countersigned by the Director of Finance. It is further provided that the Director of Finance shall audit all claims against the county for goods or services, present such claims to the Board of Supervisors for approval after such audit and draw all checks in settlement of such claims after such approval "unless the said board otherwise provides pursuant to the provisions of § 15-253." When § 15-320 is read together with § 15-253, it becomes apparent that the answer to the first portion of your question is that the County Manager may be designated by the County Board of Supervisors to sign and issue warrants for general county expenditures. The check to be issued pursuant to the order of the warrant may then be executed and issued by the Director of Finance.

Authority to approve and to issue warrants for school board expenditures is vested in the County School Board by § 22-73, as amended, in form prescribed in § 22-75, while § 22-76 provides sufficient authority for the execution and issuance by the County Director of Finance of the check drawn in payment of such warrants. I enclose a copy of an opinion addressed to the Superintendent of Public Instruction, dated January 27, 1937, and found in the Report of the Attorney General, 1936-37, at page 148. This opinion, although written in response to a question from a county which had adopted the county executive form of government, applies with equal force to a county which has adopted the county manager form of government.

The third portion of your first question involves certain sections of Title 63 of the Code. At the outset, may I state that most of the disbursements by the Department of Public Welfare are not "Claims" against the County or against the Department, but rather are in the nature of grants. Section 63-126, as amended, provides that old-age assistance shall be paid by the treasurer or other disbursing officer "upon order of the local board of such county"; § 63-150 provides that aid to dependent children shall be paid by the same person "upon order of the local board of such county," and § 63-190, as amended, provides that aid to the blind shall be paid by the same officer "upon order of the local board of such county." It follows that these orders must be approved by and executed on behalf of the County Board of Public Welfare. I feel that the provisions of § 15-322 permit the Superintendent of Public Welfare to execute such orders on behalf of the County Board.

The answer to your second question is that authority may be delegated to the County Manager by the County Board of Supervisors to issue warrants for general county expenditures, but not to issue warrants for school board expenditures or welfare department expenditures in the form of aid. The County School Board has control of the issuance of warrants for school board expenditures. The Superintendent of Public Welfare is authorized to issue "orders" for expenditures in the form of aid, while the County Manager may be authorized by the Board of Supervisors to issue warrants for other Department of Public Welfare expenditures in the form of compensation, expenses, etc.

The answer to your third question, in the light of the foregoing, is in the negative. It is my opinion that the County of Henrico may have a single form of check, and provide for the signature of the County Manager thereon with the counter-signature of the Director of Finance. For general fund expenditures, this check may be a "warrant-check," executed as a warrant by the County Manager on behalf of the Board of Supervisors and, upon countersignature of the Director of Finance, issued to the creditor as a check.

For school board expenditures, it will be necessary to have a separate warrant, which should be prepared in duplicate, with one copy going to the County Manager and the other copy to the Director of Finance. I see no objection to utilization of the vendor's invoice, or other document attached thereto, upon which the requisite authorization and direction to pay is written, printed, typed
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or stamped and properly executed on behalf of the school board in accordance with §§ 22-73, 22-75 or 22-78, as amended.

For Department of Public Welfare expenditures for aid, it will be necessary to have an order from the Superintendent of Public Welfare, which likewise should be in duplicate, with one copy going to the County Manager and the other to the Director of Finance. This order for payment of welfare grants may be attached to or written, stamped, printed or typed on a list in payroll form, and then executed by the Superintendent of Public Welfare.

Upon receipt of either type of authorization, the County Manager, if so directed by the Board of Supervisors, and the Director of Finance would sign, and the Director would issue, individual single-form county checks in payment as directed.

COUNTIES—Courthouse Property—Board of Supervisors May Not Lease Parcel to Private Corporation—May Not Provide Parking Spaces on Courthouse Square. (240)

February 17, 1960

HONORABLE R. B. STEPHENSON, JR.
Commonwealth's Attorney for Alleghany County

This is in reply to your letter of February 12, 1960, which reads as follows:

"I desire an opinion from you with respect to the following proposed usages of the Courthouse property of Alleghany County.

"First: A bank which owns and occupies property adjoining the Courthouse property is desirous of acquiring a strip of land four feet in width off the Courthouse property to be used in connection with a proposed walkway for said bank. The Board of Supervisors has considered the possibility of leasing this strip of land rather than selling it. Do you think such a lease would be legal?

"Second: The Board of Supervisors has indicated an intention of providing individual parking spaces on the Courthouse property to be used by certain office holders and employees occupying the Courthouse, and of adopting an ordinance to enforce the same. Do you think the Courthouse property can be used for this purpose, and if so, can a county ordinance be enforced as to the regulation of parking on the Courthouse property."

I feel sure that you are familiar with Section 15-686 of the Code, which limits the use of the courthouse property. This section was considered by the Supreme Court of Virginia in the case of Alleghany County v. Parrish, 93 Va. 615, which suit actually involved the courthouse property in your county. Since that case was decided, Section 2725 of the Code of 1919, as amended in Michie's Code of 1936, was amended so as to extend the powers of the board of supervisors with respect to courthouse property. This section is now Section 15-693 of the Code. This amendment, however, does not, in my opinion, authorize the board of supervisors to enter into an arrangement such as you have suggested with the bank which owns property adjoining the courthouse square. Under Section 15-686 the board of supervisors is authorized to sell to a county or town any portion of the lands owned by a county and located within a city or town and not actually occupied by the courthouse, clerk's office or jail for a street or other public purposes. This has not been construed, however, to permit the sale of a part of the courthouse square for the street or other public purposes.
but relates to property owned by the county separate and apart from the courthouse property. The county of course may build sidewalks on its property for the convenience of the public entering the courthouse, but I do not feel there is any statutory authority under which the county could in any way relinquish title of the land on which it builds its sidewalks either by conveyance in fee simple or by a lease.

With respect to your second question, I am of opinion that the board of supervisors does not have the power to provide parking spaces on the courthouse square.

COUNTIES—Courthouse Property—May Not Be Used For Parking Spaces.

288

March 22, 1960

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of March 21, 1960, which reads as follows:

"On March 16th, 1960, I wrote you asking for an opinion with reference to preparing an ordinance pertaining to parking on County property. I received your answer and opinion with reference thereto on March 17th, 1960, wherein same was answered by your enclosing me a copy of letter dated February 17th, 1960, that you had written to the Honorable R. B. Stephenson, Jr., Commonwealth Attorney for Alleghany County, Covington, Virginia.

"In order for me to be sure of your opinion in this matter, I wish to explain that the County Court House property in the Town of Christiansburg, consists of what is known as the Court House square upon which is located a monument and is not used for any automobile parking whatsoever, but for the congregation and gathering of any citizens of the County. The County property I referred to with reference to parking spaces as set out in my letter of March 16th, is the plot of ground upon which is situated the Court House building and the jail building; in between and around said building there is unused land for automobiles to travel into the jail and around in back of the jail and around the side of the Court House. It is this space that I refer to in my letter of March 16th with reference to parking spaces.

"If your opinion is still the same as set out in your letter of March 17th, with reference to the Board of Supervisors not having the power to assign parking spaces, would it make any difference if the Board of Supervisors assigned these parking spaces to the employees without any charge being made therefor?"

By reference to § 15-686 of the Code, you will note that at least two acres of land shall constitute the courthouse property and that the portion thereof not actually occupied by the courthouse, clerk's office or jail, shall be planted with trees and kept as a place for the people of the county to meet and confer together. These provisions have been held by our Supreme Court to be mandatory. See Alleghany v. Parrish, 93 Va. 615, 25 S. E. 882.

With respect to the third paragraph of your letter, I am of opinion that it is immaterial whether or not the board of supervisors should impose a charge for the parking spaces. In my opinion, the board of supervisors does not have the power to provide parking spaces under any conditions upon the two acre tract.
COUNTIES—Courthouse Property—School Board Office Building May be Erected—Board of Supervisors Will Control, But May Delegate. (229)

February 9, 1960

HONORABLE A. DUNSTON JOHNSON
Commonwealth's Attorney for Isle of Wight County

This is in reply to your letter of February 1, 1960, in which you state that the courthouse property of your county consists of 2.44 acres, on which is located the Court House, Clerk's Office, the old Jail, now used as a combination lock-up and Sheriff's Office, another building housing the County Court and the Welfare Department, a Confederate monument, a traffic circle and parking area, and the residue is planted with trees and kept as a place for the people of the county to meet and confer.

The County School Board has indicated a desire to construct on this lot a building to provide offices for the School Board and Superintendent of Schools. The School Board indicates that if it cannot erect such an office building on the courthouse lot, it will consider purchasing land adjacent to or near the courthouse lot and build an office thereon.

You have presented a series of questions, which are as follows:

"1. Any part of the 'Courthouse lot' may be used, either with or without the approval of the Board of Supervisors, for the purpose of building thereon an office for the Division Superintendent of Schools and/or the School Board, or, put another way, whether or not the Board of Supervisors has authority to permit the School Board to build such an office thereon.

"2. The School Board has authority to:

"(a) Purchase land for the purpose and build thereon an office for itself and/or the Division Superintendent.
"(b) Build such office on land owned by it and used for school purposes.\n"(c) Build such office on a part of the 'Courthouse lot.'
"(d) Use any of the money appropriated to or received by it for school uses from the Board of Supervisors or the State for any of the purposes set out in (a), (b), and (c) above.

"3. The Board of Supervisors has authority to appropriate funds to the School Board for the purpose of either building such an office on the 'Courthouse lot' or purchasing land and building such office thereon.

"4. The Board of Supervisors or the School Board would have the control and supervision of such an office building if one were built on the 'Courthouse lot.'"

With respect to question 1, I am of opinion that the contemplated office building may be erected on the courthouse lot, provided the Board of Supervisors authorizes its construction at that place. This, in my opinion, is authorized by Section 15-693 of the Code. This section—formerly Section 2725 of the Code of 1919—was amended by Chapter 169, Acts of 1940, so as to grant such authority, and since that time has constituted an exception to the restrictive and apparently conflicting provisions of Section 15-686. The case of Allegbany v. Parrish, 93 Va. 615, cited by you, was decided prior to the amendment to Section 2725, referred to herein.

With respect to question 2, the answer to (a) and (b) is in the affirmative, provided the Board of Supervisors authorizes the same.
In order for the School Board to spend money for the purpose of building an office building, it will be necessary that the Board of Supervisors appropriate money for that purpose. The School Board is not permitted, without the consent of the Board of Supervisors, to divert funds appropriated for a specific purpose.

The answer to question 3 is in the affirmative.

With respect to question 4, in my opinion the Board of Supervisors would exercise control over any school office building located on the courthouse lot, unless that power has been delegated by the Board of Supervisors to the School Board.

Counties—Curfew Ordinance—May be Adopted—Classifications Must be Reasonable. (252)

March 1, 1960

Honorable William C. Fugate
Commonwealth's Attorney for Lee County

This will reply to your letter of February 11, 1960, in which you present the following questions:

"(1) Do the Supervisors of a County have within their power the right to pass local county legislation establishing a county-wide curfew law applying to all children under eighteen years of age? The county ordinance, if they possessed such power, would require all children under eighteen years of age to be off the public streets, highways and other public places by 10:00 P.M. each day unless accompanied by parents or otherwise properly chaperoned.

"(2) Could the above proposed ordinance require that those with previous records from the Juvenile Court be required to be off the public streets, highways and other public places by 8:00 P.M.?”

Pertinent with respect to your first inquiry is Section 15-8(7) of the Code of Virginia (1950) as amended, which prescribes:

"In addition to the powers conferred by other sections, the board of supervisors of every county shall have power:

• • • •

"(7). To prohibit minors who are not attended by their parents from frequenting or being in public places whether or not on private property after such hours of the night as the governing body deems proper.”

In light of this provision of the Virginia Code, I am of the opinion that the boards of supervisors of the various counties of the Commonwealth are authorized to adopt ordinances of the type concerning which you inquire.

Whether or not it would be permissible for a board of supervisors to adopt such an ordinance with an additional provision which requires children under eighteen years of age, who have previous records in juvenile and domestic relations courts, “to be off the public streets, highways and other public places by 8:00 p.m.” would depend upon the reasonableness of the classification upon the basis of which the more stringent regulation is imposed. While the question is not entirely free from doubt, I am constrained to believe that a classification which subjects any child who has ever had a previous record in a juvenile and
domestic relations court to a more confining regulation than is imposed upon children not having such previous records, would not be a reasonable one. Such classification—made without regard to the character of the prior proceedings before a juvenile and domestic relations court, the age of the child when such proceedings took place, the period of time which has elapsed since such proceedings or the deportment of the child in the interval since such proceedings were conducted—would not, in my opinion, rest upon a rational and practicable basis. Moreover, an ordinance containing such an additional provision would present a possibility of conflict with existing State law which permits the judge of a juvenile and domestic relations court to fix limitations upon the hours at which a child within the purview of the Juvenile and Domestic Relations Court Law may frequent public places without supervision of his parents. See, Code of Virginia (1950) as amended, Section 16.1-178.

I regret that the pressure of business upon this office occasioned by the current session of the General Assembly of Virginia has prevented an earlier response to your communication. Trusting that the delay has not inconvenienced you, I am

COUNTIES—Depositories—Securities Pledged—Approval by County Finance Board and Board of Supervisors. (102)

HONORABLE G. M. WEEMS
Treasurer of Hanover County

September 25, 1959

I am in receipt of your letter of August 28, 1959, in which you call my attention to the provisions of Section 58-944 et seq. of the Code of Virginia (1950), as amended, and present the following inquiries:

"(1) The question before me is whether or not in the agreement between the depository, the escrow depository and the finance board (or Board of Supervisors in the event the finance board has been abolished as provided for in section 58-940) can provide for the general approval of bonds of United States Government in such amounts as may be offered from time to time, and whether or not these bonds can be withdrawn from time to time by certification of the treasurer that the remaining bonds are in excess of the deposits.

"(2) I would appreciate your advising whether or not it is necessary for the board of supervisors or the finance board to approve more than the general classification of the securities and not have to approve the amount of security or the security by individual bond numbers and denominations.

"(3) Should the supervisors or the executive secretary be bonded or should the escrow bank be bonded?"

Pertinent to the resolution of the first two questions posed in your communication are the provisions of the initial paragraphs of Section 58-944 of the Virginia Code which prescribe:

"No money received by a county treasurer shall be deposited with any depository of the treasurer's county selected and approved as provided in Section 58-943 until such depository shall have given bond with the same conditions as those required for bonds given by State depositories who elect to give bond to protect money deposited with them by the State Treasurer pursuant to the provisions of Sections
2-179 to 2-182 or until such depository shall have pledged and deposited in the manner and to the extent hereinafter provided and for the protection of the money deposited with it pursuant to the provisions of this section securities of the character authorized as legal investments under the laws of this Commonwealth for public sinking funds.

"Provided, however, that:

"(a) All securities offered by a depository shall have the approval of the county finance board or of the county board of supervisors, if in such county all functions of the finance board are vested in the board of supervisors, which approval may, in the board's discretion, be by general authorization to the depository to substitute from time to time, (1) for any securities on deposit, securities that are obligations of or guaranteed by the United States, or (2) for securities on deposit that are obligations of or guaranteed by the State of Virginia or Virginia counties, cities, towns, districts or other public bodies, securities that are either obligations of or guaranteed by the United States or obligations of or guaranteed by the State of Virginia or Virginia counties, cities, towns, districts or other public bodies, provided that each security substituted shall comply with the requirements of Section 2-297 and, at the time of substitution, shall be of market value at least equal to the market value of the security for which substituted. Market value may be determined as the mean between the bid and offered quotations furnished by a recognized dealer in securities on the date of the substitution. The Board may at any time revoke its general authorization and require approval of substitution in each case; * * *" (Italics supplied).

Prior to its amendment by the General Assembly of Virginia during its 1958 session, Section 58-944(a) contained only a single sentence which provided that:

"All securities offered by a depository shall have the approval of the county finance board; . . ."

See, Acts of Assembly (1956) Chapter 84, page 94. During the period in which subparagraph (a) of the statute under consideration consisted of the succinct statement quoted immediately above, this office ruled that a county finance board (or board of supervisors) was required to satisfy itself that securities being substituted for those on deposit actually met the requirements of the statute and that a general authorization for the substitution of designated types of securities for those securities comprising the original offering of a depository and specifically approved by the appropriate board was not contemplated by the statute. See, Report of the Attorney General (1956-1957), page 90.

During the 1958 session of the General Assembly, Section 58-944(a) was amended to contain the additional language set out in the initial quotation of this opinion. See, Acts of Assembly (1958) Chapter 442, page 570. As thus amended, the statute still specifies that all securities offered by a depository shall have the approval of the county finance board or board of supervisors, as the case may be; however, it further provides that such approval may be by general authorization to a depository to substitute from time to time certain designated types of securities for those securities on deposit. In my opinion, the power thus conferred upon county finance boards and boards of supervisors to approve securities by general authorization is limited to those securities which may be substituted for those already on deposit and specifically approved by the appropriate board.

In light of the foregoing, I do not believe it would be permissible for the
agreement between a depository, an escrow depository and a finance board or board of supervisors to provide for the general approval of certain securities in such amounts as may be offered from time to time, except with respect to securities offered in substitution for those already on deposit and specifically approved. Moreover, I do not believe that the language of Section 58-948 of the Virginia Code, which prohibits a treasurer from permitting the amount of money on deposit with any depository to exceed the amount of securities pledged and deposited to secure such money, is sufficiently broad to authorize the withdrawal of pledged securities merely upon certification by the treasurer that the remaining bonds are in excess of deposits, and without the approval of the finance board or board of supervisors.

I am further of the opinion that Section 58-944(a) does not authorize a county finance board or board of supervisors to approve—by general classification—an initial offering of securities by a depository, but requires specific approval of the particular securities offered and the amounts thereof. However, I do not think that the county finance board or board of supervisors need approve the individual security numbers and denominations.

With respect to your final question, I have been unable to discover any provision of the Virginia Code applicable to the general subject under discussion which requires the county finance board, board of supervisors, executive secretary or escrow depository to be bonded.

I regret that the pressure of business in this office has prevented an earlier reply to your communication.

COUNTIES—Employees—Ownership of Newspaper by County Employee Bar to Publication Therein of Official County Notices Paid for by County. (290)

HONORABLE WILLIAM F. PARKERSON, JR.
Commonwealth's Attorney for Henrico County

March 28, 1960

This is in reply to your letter of March 25, 1960, in which you state that an employee of Henrico county is one of the principal stockholders of the Henrico Herald, a newspaper published in the city of Richmond and circulated in Henrico county. You have requested my opinion as to whether or not under § 15-333 of the Code the county would be prohibited from publishing official county notices in the Henrico Herald and whether or not this prohibition would apply to orders of publication with respect to cases pending in the Circuit Court of Henrico county, such as divorce cases, no part of the advertisement costs being paid out of the county funds.

In my opinion § 15-333 of the Code prevents the publication by the county of any official notices in the Henrico Herald in every case in which the county pays the costs of publication or any part thereof. § 15-333 does not contain the exception found in § 15-504, in which it is stated that the prohibitions of § 15-504 do not apply in those cases where the only newspaper published and having general circulation in the county is one that is owned by an official or employee of the county.

In my opinion the prohibitions contained in § 15-333 would not apply to orders of publication issued by the Circuit Court of the county where the costs of publication are paid by the litigants or are paid out of a fund other than the county fund.
COUNTIES—Equipment and Supplies of Certain Offices—Statutes Require Certain Furniture and Equipment. (26) 

HONORABLE W. CARY CRISMOND 
Clerk of Circuit Court of 
Spotsylvania County 

This is in reply to your letter of July 8, 1959, which reads as follows: 

"I have been instructed by the Board of Supervisors to write to you and ask the ruling on the following question: 

"Does a county officer have the right to purchase any equipment for use in his office and charge the cost of said equipment to the Board of Supervisors, if a request has been previously made by the officer to the Board to purchase said equipment and the Board has denied said request."

It would not be possible for me to furnish a categorical answer to this question. You are doubtless aware of the various statutes requiring a Board of Supervisors to provide certain types of supplies and equipment to county officials. Your attention is called to Sections 14-62, 14-77, 14-77.1, 14-81, 15-10.1 and 15-689 of the Code, which relate to public offices and supplies for various officers. This office has held that Section 15-689 requires the furnishing of such furniture and other equipment necessary and usual to the operation of an office. An office, as used in this statute, means that the official must be provided with adequate facilities usual and necessary to the operation of an office of the type which may be under consideration. 

In my opinion, whenever the State Board of Compensation has made an allowance to a county officer to cover certain expenses of his office, whether it be equipment or some other item, then the officer may make purchases of such items in accordance with such allowance without first seeking and obtaining the consent of the Board of Supervisors. In a case where no budget has been authorized or appropriation made for such equipment, I feel that the officer involved would be required to obtain the approval of the Board before obligating the county for the cost of such item. For example, when a budget has been approved for a treasurer or a commissioner of the revenue under Section 14-77.1, no further authorization would be necessary. 

A Board of Supervisors may not, in my opinion, arbitrarily refuse to purchase such equipment or supplies as are necessary for the proper functioning of a county office. Nor can an officer create obligations binding upon the Board without obtaining an authorization for such expenditures. Whenever there is a disagreement between the officer and the Board, the officer may by appropriate court action seek to compel the board to provide such necessary supplies and equipment. 

COUNTIES—Estimates of Expenditures (Budgets)—School Funds—Control of Board of Supervisors Over. (279) 

HONORABLE C. FRED BAILEY 
Member of the Board of Supervisors of 
Isle of Wight County 

This is in reply to your letter of March 4, 1960. The press of work involved in the closing stages of the recent session of the General Assembly has prevented an earlier reply.
You enclosed photocopies of the estimate and supplementary estimate of money deemed by the School Board of Isle of Wight County to have been needed for school purposes for the fiscal year 1959-60, and stated that these detailed estimates were condensed by the County Board of Supervisors and published for informative purposes, in accordance with law, as a part of the overall county estimate (budget) by listing only the major categories and the total amounts estimated thereunder (i.e. "Capital Outlay--$26,300.00"). A tax rate was set to meet all of the needs of the county, while appropriations during the fiscal year have been made on a monthly basis, each department submitting a monthly request therefor.

Your letter further states:

"You will note under a subtitle of Capital Outlay there appears an item 600A Purchase Land $3,000.00 for the fiscal year of 1959-60. The Isle of Wight County School Board has spent during the 1959-60 fiscal year $4,000.00 for the purchase of land and has agreed to purchase an additional parcel for the sum of $450.00. There is nothing in the Board of Supervisors records to show that the School Board of Isle of Wight County has requested a change within their budget or estimate and nothing to show that a specific request has been made for additional funds.

"Under these circumstances I would like to have your opinion on the following questions:

1. Can the School Board of Isle of Wight County legally transfer funds that were shown in their budget or estimate for a specific purpose to another specific purpose within the same major category of their budget or estimate without approval of the governing body of Isle of Wight County?

2. Can the School Board of Isle of Wight County legally transfer funds that were shown in their budget or estimate for a specific purpose to another specific purpose within the same major category of their budget or estimate without approval of the governing body of Isle of Wight County?

3. Can the School Board of Isle of Wight County legally request an appropriation that is not in conformity with their detailed budget or estimate without explaining the non-conformity and specifically requesting the governing body of Isle of Wight County to make such a change in their budget or estimate?

4. Was the Isle of Wight County School Board within its legal rights to overspend the specific item of Land Purchase in their detailed budget or estimate for fiscal year of 1959-60 without approval of the Isle of Wight Board of Supervisors?"

I will answer the above four questions seriatim.

1. Section 22-72, as amended, of the Code of Virginia, specifies the powers and duties of school boards and subsection (9) of this Code section reads as follows:

"(9) Costs and Expenses.—In general, to incur costs and expenses, but only the costs and expenses of such items as are provided for in its estimates submitted to the tax levying body without the consent of the tax levying body."

This section was formerly codified as § 656 of the Code of 1942. In January, 1944, the Supreme Court of Appeals of Virginia construed § 656 to mean that if the school board "wanted to expend money for purposes not set up in its estimate, then it would be required to get the consent of the tax levying body."
Board of Supervisors v. County School Board, 182 Va. 266, 278. The Court went on to say (182 Va. at page 281): "After the board of supervisors have appropriated money for schools, the exclusive right to determine how this money shall be spent is in the discretion of the school board, so long as it stays within the limits set up in the budget." However, this section must be read together with § 58-839, as amended.

The estimate filed by the School Board is not the basis for expenditures by the School Board. The School Board's authority with respect to expenditures depends upon subsequent appropriations made by the Board of Supervisors. Therefore, "Capital Outlay" expenditures by the school board depend entirely upon authorization by the Board of Supervisors. The items set forth under "Capital Outlay" in the estimate filed by Mr. Hall, Superintendent of Schools, are not binding on either the Board of Supervisors or the County School Board.

The Board of Supervisors has adopted a month to month basis of appropriation. If each month the Board of Supervisors makes an appropriation to the School Board for "Capital Outlay" without further language restricting the specific use for which the appropriation is made, then the School Board may expend such appropriation, any accumulation thereof, or any unexpended amount of such accumulated appropriations for any "Capital Outlay" expenditure without further authority from the Board of Supervisors.

The foregoing paragraphs, I believe, answer your questions 1 and 2.

2. With respect to your third question, the County School Board may request an appropriation "not in conformity with their detailed budget or estimate" in any event. Of course, this request necessarily must be made of the County Board of Supervisors, but neither the County estimate nor the School Board estimate is involved.

3. With reference to your fourth question, as I have indicated above, the appropriation by the County Board of Supervisors controls. As pointed out, the estimate is not binding so long as the appropriation is for a category, such as "Capital Outlay" without specific restriction (i.e., for the purchase of a school bus or other similar purpose), the appropriation may be expended for any purpose within such category. Conversely, if an appropriation is made, for example, to purchase a school bus, it may not be expended for another outlay purpose, such as the purchase of land, without the prior approval of the Board of Supervisors.

The Commonwealth's Attorney of your county recently conferred with members of my staff with respect to certain features of the control of the Board of Supervisors over school expenditures. I am not sure that the specific questions presented by you were fully discussed. Therefore, I am forwarding to Mr. Johnson a copy of this communication. You might ask him to show you a copy of the opinion rendered to him under date of February 9, 1960.

COUNTIES—Executive Secretary Form—County Clerk—Allowances to. (104)

September 28, 1959

HONORABLE CARTER R. ALLEN
Acting Commonwealth's Attorney for
Augusta County

This will acknowledge receipt of your letter of September 24, 1959, which reads as follows:

"Recently Augusta County adopted the executive secretary form of county government under the provisions of Article 8 Chapter 15 of the Code of Virginia. Thereupon the question arose whether the allowances paid out of the county treasury to the County Clerk under provisions of Section 14-163.1 of the Code would be legal or whether
it is a discretionary requirement as compensation for the services of the County Clerk.

"Under the provisions of Section 15-555.8 it would appear that the duties of the County Clerk are vested in the executive secretary and the allowances would no longer be payable. However, Section 15-551.11:1 recreates the problem and I would appreciate your opinion as to whether these allowances can be paid to the County Clerk after the employment of the executive secretary."

Section 14-163.1 of the Code provides that:

"The governing body of every county is empowered to determine what annual allowance, payable out of the county treasury, shall be made to the county clerk of such county.

This section further provides that this provision shall not apply to any county operating under any form of county organization and government provided for in Sections 15-34 to 15-384 (Chapter 12, Title 15).

Section 15-551.8 of the Code provides that:

"Upon the appointment and qualification of the executive secretary authorized by § 15-551.1 the county clerk of such county shall be relieved of his duties in connection with the governing body and all of his such duties shall be imposed upon and performed by the executive secretary."

It will be observed that clerks in counties operating under the provisions of Chapter 16, of Title 15, in which Section 15-551.1 through 15-551.15 are contained, are not excluded from the provisions of Section 14-163.1.

Section 14-163.1, in my opinion, does not require the local governing body of a county to make allowances to clerks within the limits therein prescribed, but whether or not such allowances will be made is left to its discretion.

It is not stated in Section 14-163.1 that the allowances shall be predicated upon the services rendered by the clerk to the board of supervisors. The compensation for such services is fixed by Sections 15-238 and 15-239 of the Code.

Section 14-163.1 permits the county boards, within the limits therein prescribed, to make allowances, which apparently are in the nature of supplements, to the clerks of all counties except those coming within the provisions of Section 15-345 to 15-384. In my opinion, Section 15-551.8 does not deprive the board of supervisors of the powers granted under Section 14-163.1.

In my opinion, Section 15-551.11:1 is not applicable to Augusta County, since it does not come within the population bracket specified. I think it is clear that the terminal sentence of this section relates to a county meeting the classification requirements of the section. The paragraph containing this sentence commences with the phrase "every such governing body", the reference being to the "governing body" mentioned in the first paragraph of this section.

COUNTIES—Executive Secretary—“Full Time” Employment Does Not Preclude Outside Employment Which Doesn’t Interfere With County Work.

(80) September 3, 1959

Mr. Richard J. Webb
Executive Secretary
Princess Anne County Board of Supervisors

This is in reply to your letter of August 26, 1959, which reads, in part, as follows:
"It will be appreciated if you will forward an opinion to this office regarding Title 15 Chapter 16 Section 15-551.2. (Page 522 of Code Book 3) (1) Any executive secretary so appointed shall devote his full time to the work and service of the county under the direction of the governing body, to whom he shall be accountable.

"The opinion is requested for the following reason:

"The Southeastern Virginia Regional Planning Commission and the Tidewater Development Council have been trying to employ a full time Research Director, they have recently secured the services of a capable man. The person in question is not a resident of this area. The groups noted have requested me to assist him on a part-time basis until he becomes familiar with the area and have offered me compensation for the work—which would be on week ends and after normal county work hours.

"I am presently serving on both groups as a representative of the county and doing some of the work in question without compensation on my own time.

"The Board of Supervisors of the County of Princess Anne do not object to my performing the work, nor have they any objection to my receiving compensation, however, the Commonwealth's Attorney and the County Clerk, while not objecting feel that the phrasing of Section 15-551.2. noted above should be clarified to prevent any possible repercussions."

Section 15-551.2 of the Code, to which you refer, provides, in part, as follows:

"(1) Any executive secretary so appointed shall devote his full time to the work and service of the county under the direction of the governing body, to whom he shall be accountable. * * *

I do not think that the requirement that the executive secretary shall devote his full time to the work and service of the county may be construed to prevent him from performing other services with or without compensation, so long as such services do not require his absence from his office during normal working hours and do not interfere with his duties as executive secretary. I think that this provision requires the executive secretary to make his employment as executive secretary his principal business to the exclusion of full time management or the conduct of any other business, but it does not mean that he is required to give twenty-four hours a day or every moment of his waking hours to the county's business. I do not feel that this provision prohibits an executive secretary from looking after other interests so long as he performs his services for the county during the normal working hours and is subject to call at any other time that his official duties might require his time.

If the governing body of the county is of the opinion that the contemplated services to the Southeastern Virginia Regional Planning Commission and the Tidewater Development Council will not interfere with your normal duties, in my opinion, the rendering of the services contemplated by you for these organizations during the hours stated will not be in violation of the statute in question.

COUNTIES—Fire Protection—May Construct Water Tank For Joint Use With Town. (130) October 16, 1959

HONORABLE THOMAS E. WARRINER, JR.
Commonwealth's Attorney for Brunswick County

Your letter of October 12, 1959, to Attorney General Harrison has been re-
ferred to me for reply. You have requested an opinion as to the legality of the school board or the board of supervisors constructing a water tank at a site near the Brunswick High School and the Brunswick County Health Center for the purpose of providing adequate water pressure to the fire prevention and fire fighting facilities for the town of Lawrenceville. It is my understanding that the board of supervisors is considering the erection of a water tank of approximately 100,000-gallon capacity, which tank would be connected with the water system of the town of Lawrenceville and would enable the fire fighting personnel of the town of Lawrenceville to more effectively protect the Brunswick High School and the Brunswick County Health Center and industries and other properties located in that area. The construction of this tank would obviously provide the pressure needed in connection with any sprinkler system that might be installed in any factory or public building in that vicinity.

I call attention to Section 15-8(5) of the Code of Virginia, which provides that "in addition to the powers conferred by other sections, the board of supervisors of every county shall have power: * * (5) To adopt such measures as they may deem expedient to secure and promote the health, safety and general welfare of the inhabitants of their respective counties, not inconsistent with the general laws of this State."

On September 21, 1937, the Honorable Abram P. Staples, Attorney General at that time, rendered an opinion to the Commonwealth's Attorney of Bath County in response to a question as to whether or not the board of supervisors of Bath County was authorized to contribute money to a duly organized fire fighting company of the county for the purpose of purchasing fire fighting equipment. I am enclosing copy of Mr. Staples' opinion, which is published in Report of the Attorney General for 1937-'38, at page 39. You will note that in this opinion he considered Section 2743 of the Code, which is now Section 15-8(5). In this opinion Attorney General Staples stated that the board of supervisors of the county had no authority to make any donation to a fire company but that in his opinion the board would have authority to purchase on behalf of the county fire fighting equipment and allow it to be used by the volunteer fire company. Incidentally, since Judge Staples' opinion, Section 15-16.1 of the Code was enacted which now authorizes a board of supervisors to make such donations. Mr. Staples further stated in this opinion:

"The fighting of fires bears a direct relation to the safety, health and general welfare of the people of the county, and, in my opinion, comes within the power conferred upon the board of supervisors by the language above quoted."

I also enclose another opinion dated June 14, 1939, written by Attorney General Staples to the Commonwealth's Attorney of Essex County, which relates to the authority of towns and counties to enter into contracts and agreements with respect to equipment for fire fighting. Section 2730 (c) of the Code, referred to in this opinion, is now Sections 15-724, 15-725 and 15-726 of the Code, to which sections you are referred.

I also enclose copy of an opinion issued by Governor Almond, while he was Attorney General, to the Clerk of the Circuit Court of Buchanan County, which relates to the power of the boards of supervisors and towns to enter into a contract for fire protection. This opinion is found in Report of Attorney General for 1951-'52, at page 16, and is based upon the provisions of Section 27-2 of the Code. Furthermore, I call your attention to Section 27-25 of the Code, which reads as follows:

"The governing body of every county shall have power to provide for the purchase, operation, manning and maintenance of suitable equipment for fighting fires in or upon the property of the county and
of its inhabitants, and to prescribe the terms and conditions upon which the same will be used for fighting fires in or upon privately owned property."

In my opinion, there can be no question about the authority of the board of supervisors of a county to make appropriations from the general fund of the county for the purpose of installing and operating adequate fire prevention facilities, and the county may enter into contracts with towns located in the county for the joint use of such facilities. Moreover, I am of the opinion that the county may bear the expense of purchasing or installing fire fighting facilities, such as storage tanks, etc., and may enter into an arrangement with a town located in the county wherein the town assumes the entire or partial responsibility for the operation and maintenance of such facilities.

COUNTIES—Forest Program—No Authority to Withdraw and Refuse to Pay Sum Required by Statute. (370)

HONORABLE L. HARVEY NEFF, JR.
Commonwealth's Attorney for Grayson County

This is in reply to your letter of June 1, relating to Section 10-46 of the Code. You have presented the following question:

"My question is this, can the Board of Supervisors of this County withdraw from the forest program and refuse to pay amounts demanded by the Director of Conservation and Development? If the answer to the above paragraph is in the affirmative, and the amount required by the Board of Supervisors to appropriate is limited to the one cent per acre expressed in the above referred to Section, can the County be required to pay any sum in the excess thereof?"

Upon examination of § 10-46 of the Code and the other provisions of Article 2, Chapter 4, Title 10 of the Code, I am of opinion that the counties do not have authority to avoid the obligations of this section. The amount a county may be required to pay under this section is limited to one cent an acre of privately-owned forests in the county according to the United States Survey of 1940 subject to additions and deductions of acreage since the survey was made.

COUNTIES—Incorporation of—Special Act Could Not Amend General Law or Charter of Town. (50)

HONORABLE JOHN C. WEBB
Member of the House of Delegates

This is in reply to your letter of August 5, 1959, which reads as follows:

"The Town of Vienna located in Fairfax, Virginia, presently has a commission making a study of the future government of Vienna. The commission has been concerned over the prospect that Fairfax County may seek some change in its form of government that would attempt to
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curtail the powers now invested in the Town of Vienna by its Charter and by general law.

"I have been requested by Mr. Charles A. Robinson, Jr., a member of the commission, to request your opinion on the following questions:

"1. Could a new Charter providing for the incorporation of the County of Fairfax as a city constitutionally curtail the powers now invested in the Town of Vienna by its Charter and by general law without a provision requiring a referendum to be held by which the citizens of the Town of Vienna could approve such curtail?

"2. Could the General Assembly by legislative enactment constitutionally curtail the powers now invested in the Town of Vienna by its Charter and by general law without a vote of the citizens of the Town of Vienna?"

I assume that the town of Vienna was granted a charter under the provisions of paragraph (a) of Section 117 of the State Constitution.

If it is proposed to amend the charter of the town of Vienna by a special act relating to the organization and government of the town, which act is passed without regard to, and unaffected by any of the provisions of Article VIII of the Constitution, subject to the exceptions contained in Section 117(b), such new or amended charter cannot be effective until it has been adopted by a majority vote of those qualified voters of the town voting in any election to be held for the purpose of ratifying the charter.

Any act incorporating the county of Fairfax could not, in my opinion, embrace provisions amending the charter of Vienna or the general law relating to municipalities. Such legislation would, I believe, be prohibited by Section 52 of the Constitution. In my judgment separate acts would be necessary for the purpose of amending the general law and the charter of the town. I do not mean to imply that the General Assembly cannot, under the Constitution, grant powers to a municipality which would be different from the general law on the subject. This would not be an amendment to the general law.

The answer is applicable to both of the questions which you present.

COUNTIES—Industrial Development—County Board May Not Appropriate Lump Sum to Private Organization as Chamber of Commerce. (197)

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for Wise County

December 31, 1959

This is in reply to your letter of December 30, 1959, which reads as follows:

"A number of organizations in Wise County propose to request the Board of Supervisors to appropriate $25,000 for the purpose of securing new industry for Wise County, Virginia. The only authority for such an appropriation I am able to find is Section 15-12 of the Code of Virginia, which provides for an expenditure for advertising and giving publicity to the resources and advantages of their county.

"In your opinion is this section broad enough to allow a county to appropriate money for the employment of industrial experts or the appropriation of money to a Chamber of Commerce or similar organization for the purpose of promoting industry.

"If the above question is answered in the affirmative can the Board of Supervisors appropriate this money and then pay it to some organization without supervision by the Board of Supervisors?"
"If this section is not broad enough to cover an appropriation for the employment of industrial experts, would you please give me your opinion as to whether or not under the general laws of the Commonwealth the Board of Supervisors can appropriate money for the securing of new industries, and to that end the employment of industrial experts."

I believe that the following opinions which are published in our Annual Report for 1958-1959 will provide the answers to the questions presented by you:

Opinion to Walter N. Rogers, dated March 16, 1959, appearing on page 55.
Opinion to Alton I. Crowell, dated April 17, 1959, appearing on page 56.
Opinion to A. Erwin Hackley, dated April 16, 1959, appearing on pages 56, 57 and 58.

You will note that on page 58 reference is made to Sections 15-253, 15-256 and 15-257 of the Code. Under these sections disbursements would have to be made upon invoices approved by the Board of Supervisors. These sections, in my opinion, would prohibit the Board from making a lump sum appropriation to an organization without further supervision of the Board.

COUNTRIES—Insurance—May Contract With Foreign Corporation For. (19)

HONORABLE WILLIAM J. HASSAN
Attorney for the Commonwealth for Arlington County

July 15, 1959

This is in response to your letter of July 10, 1959, in which you inquire whether or not the county may purchase Workmen's Compensation insurance from Lloyd's of London. Lloyd's is not licensed to do business in this State, as required by Title 38.1 of the Code of Virginia.

Section 38.1-85 of the Code reads as follows:

"No insurance company shall engage in any insurance transaction or do any insurance business in this State until it has obtained a license from the Commission so to do, which license, in case of a foreign or alien company, shall be in addition to the certificate of authority required under article 4 of this chapter. Each such license shall be signed by a member or other duly authorized agent of the Commission, and shall expire on the thirtieth day of April next succeeding the date on which it becomes effective."

In addition, acting as an agent for such an unlicensed company is prohibited by § 38.1-281 of the Code, which reads as follows:

"No person shall solicit, negotiate or effect in this State contracts of insurance on behalf of any insurance company which is not licensed to transact the business of insurance in this State; provided, however, that nothing herein shall be construed as prohibiting any person from obtaining from an unlicensed insurance company insurance upon his own life or property.

"Any person violating the provisions of this section shall be guilty
of a misdemeanor and upon conviction thereof shall be punished for each offense by a fine of not less than five dollars, nor more than one thousand dollars, or by confinement in jail not exceeding twelve months, or both, in the discretion of the jury or of the trial justice, or of the court trying the case without a jury, and, in addition thereto, shall be liable to any resident of this State on any claim against such unlicensed company arising out of a contract or policy solicited, negotiated or effected by such person or which such person assisted in soliciting or negotiating.

“Nothing in this section shall apply to the solicitation, negotiation or effecting of contracts of insurance on vessels or craft, their cargo, freight, marine builders risk, maritime protection and indemnity, ship repairer's legal liability, tower's liability or other risk commonly insured under ocean marine insurance policies as distinguished from inland marine insurance policies, provided the person soliciting, negotiating or effecting this kind of insurance on behalf of any insurance company which is not licensed to transact the business of insurance in this State is licensed in this State as a resident agent or company representative.”

There is, however, no statutory provision which would prohibit the County from purchasing such insurance from Lloyd's. I call to your attention, however, the fact that Lloyd's being an unlicensed company, has not deposited with the Treasurer of Virginia such security as is provided by law, and there are, therefore, no assets of the company in this State from which to collect a claim.

You state that it has been suggested by a Baltimore, Maryland, insurance broker that the county contact a Lloyd's agent in Baltimore for a proposal, and that this insurance could be written by Lloyd's in conformity with Virginia law and without the payment of commission. You request my views relative to this suggestion.

I am of the opinion that the broker in question may be in violation of Section 38.1-281 quoted above, for the reason that he is soliciting insurance to be effective in this State, such insurance to be placed with a company not licensed in Virginia. This section makes no reference to the payment of a commission, and I am of the opinion that the same is not pertinent herein.

In view of the foregoing, I am of the opinion that, while there is no provision of law which prohibits the county from purchasing this insurance from an unlicensed company, the writing of such insurance by an unlicensed company in this manner would be in violation of the code sections enumerated herein.

The General Assembly has enacted these laws for the protection of the people of the State. It would seem that it should be the policy of the State and its political subdivisions to refrain from participating in any insurance contracts which may be solicited in violation of State law and written by an insurance company not licensed to do business in the State.

COUNTIES—Land Acquired by County Should be Conveyed in Name of County. (311)

HONORABLE FERDINAND F. CHANDLER
Commonwealth's Attorney for Westmoreland County

April 15, 1960

This is in reply to your letter of April 14, which reads as follows:

“In writing a deed whereby Westmoreland County is acquiring land for the public use of the County, in what name should the title to
the land be taken? Should the grantee be designated as the ‘Board of Supervisors of Westmoreland County’, or only ‘Westmoreland County’, or precisely how should the grantee be designated?"

In my opinion the deed should be made to the county. Sections 15-686 and 15-688 of the Code provide for the acquisition of real estate by the county and in Section 15-686 it is stated that “the fee simple of the lands shall be in the county.” While this provision is not found in Section 15-688, which provides for the acquisition of lands in addition to the minimum required for a courthouse, clerk’s office and jail, I think that the provision with respect to how the title shall be vested is applicable to both Code sections.

COUNTIES—Liability For Injuries Caused by Negligence of Sheriff and Deputies. (219)

HONORABLE J. VAUGHAN BEALE
Commonwealth’s Attorney for Southampton County

January 25, 1960

This is in response to your letter of January 21, 1960, which reads as follows:

“The Southampton County Board of Supervisors, at their meeting on January 18th, requested me to obtain an opinion from you as to whether or not Southampton County might be liable in regards to the following:

“The Sheriff of Southampton County, and his three deputies, own their automobiles, and are paid the sum of 7 cents per mile for the operation of same on official business. Each owner has a liability policy on his automobile, and the County pays a portion of the premium. The insurer has advised that, as the automobiles in question are equipped with sirens and two-way radios, they are insured as police cars, and the County pays that portion of the premium necessitated by this classification.

“As the amount of liability carried is only $30,000.00 on accidents involving one person, and $60,000.00 on accidents involving more than one person, the Board desires an opinion from you as to whether or not the County could possibly be liable for an accident in which one of the automobiles in question was involved.”

I am enclosing copy of an opinion dated August 25, 1944 given to Mr. W. A. Scarborough, Superintendent of Dinwiddie County School Board, which opinion was reported in the Report of Attorney General for 1944-'45 at page 149. This opinion was rendered by the Honorable Abram P. Staples during his tenure of office as Attorney General.

I also direct your attention to Section 114 of the Constitution of Virginia, which reads as follows:

“Counties shall not be made responsible for the acts of the sheriffs.”

It is my opinion, therefore, that there would be no liability upon the county under the circumstances which you have stated.

COUNTIES—Ordinances—Amendment Must be Published to be Valid. (386)

HONORABLE R. D. COLEMAN
Commonwealth’s Attorney for Scott County

June 15, 1960

This is in reply to your letter of June 13, in which you state that the board
of supervisors of your county has amended an ordinance that had been adopted
on October 4, 1948, pertaining to the sale of beer and wine in Scott County,
Virginia. The original ordinance was adopted pursuant to the provisions of
the Alcoholic Beverage Control Board Act. It appears that the amended ordinance
was not published in accordance with the provisions of Section 15-8 of the
Code. You have requested my opinion as to whether or not the ordinance was
properly adopted and can be enforced.

In my opinion, on account of the failure of the board of supervisors to
follow the procedure prescribed in Section 15-8 of the Code, the amendment
to the ordinance is of no effect.

In my opinion, the provisions of Section 15-8(9) with respect to publication
are mandatory. These provisions are applicable where the ordinance amends an
existing ordinance to the same extent as in a case where an ordinance is adopted
in the first instance.

COUNTIES—Ordinances—Compulsory School Attendance—Penalty—§ 19-265
Applicable. (45)

HONORABLE VOLNEY H. CAMPBELL
Commonwealth's Attorney for Washington County

August 4, 1959

This is in reply to your letter of August 3, 1959, which reads as follows:

"The Washington County Board of Supervisors is planning to enact
an ordinance at its next regular meeting to provide that the provisions
of Chapter 72 of the Acts of the General Assembly of Virginia, Extra
Session of 1959, will be in effect in our county from and after Septem-
ber 1, 1959. I have prepared an ordinance for the consideration of the
Board prepared according to the ordinance which you suggested to
Honorable Julius Goodman, Commonwealth's Attorney for Montgomery
County, in your letter of July 8, 1959.

"The question has occurred to me as to what would be the proper
punishment for a violation of the ordinance after it has been adopted.
Sections 18 and 19 of said Chapter 72 provide that anyone violating
the terms of the Act shall be guilty of a misdemeanor. No specific
penalty is provided in these Sections, and I would assume that Section
19-265 of the Code, which sets out the punishment for misdemeanors
for which no other punishment or no maximum punishment is pre-
scribed, would be in force. However, Section 15-8 of the Code, which
sets out the general powers of Boards of Supervisors to enact ordinances,
states that fines for violations of ordinances of the Board of Supervisors
shall not exceed $300.00 and imprisonment shall not exceed 30 days.

"I would greatly appreciate your opinion as to what penalty should
be for a violation of the compulsory school attendance law."

In my opinion, Section 19-265 of the Code is applicable. Chapter 72 of the
Acts of the Extra Session, which appears in the Virginia Code as Article 4 of
Chapter 12, Title 22 is a State law and the State Board of Education is charged
with the duty to see that the law is properly enforced. The ordinances adopted
by the localities pursuant to the provisions of Section 22-275.24 have the effect
of permitting the State law to be enforceable in the localities that adopt the
ordinances.
COUNTIES—Ordinances—Zoning—Adoption of—Publication. (§)

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney for Loudoun County

July 7, 1959

This is in reply to your letter of July 6, 1959, which reads as follows:

"The County of Loudoun is in the process of adopting a new zoning ordinance and the question was presented to me inquiring whether it is necessary to advertise the ordinance for two weeks after its adoption as provided for in Section 15-8 of the Code. I take this occasion to request the benefit of your opinion concerning this question."

In this connection I enclose copy of an opinion dated August 13, 1951, and published in the Attorney General Report for 1951-52, at page 185.

If the zoning ordinance in question has been adopted pursuant to Section 15-846, I am of the opinion that it is not necessary to comply with the provisions of Section 15-8 with respect to the adoption of ordinances generally.

Section 15-859 referred to in the enclosed opinion relates to zoning in those counties qualifying under Article 3 of Chapter 24 of Title 15.

I do not feel that the variance between the provisions of Section 15-859 and Section 15-846 would make any difference.

In the case of Ciaffone vs. Community Shopping Corporation, 195 Va. 41, it seems that the ordinance was enacted pursuant to Section 15-859 and no question was raised in this case of the fact that the ordinance was not published in accordance with Section 15-10, which is the section that would have been applicable to Arlington County.

The general powers conferred on a county governing body under Section 15-8 do not specifically include the power to enact zoning ordinances. The publication necessary for enactment of an ordinance within the general powers enumerated therein is prescribed in this section. The statutes conferring upon counties the power to enact ordinances with respect to zoning provide a special procedure to be followed by the governing body in enacting the ordinance. It seems that this procedure was followed in the case of County of Fairfax v. Parker, 186 Va. 675.

As was pointed out in the enclosed opinion, no harm can be done and all doubt as to the proper mode of publication can be removed by proceeding under Section 15-8 as well as Section 15-846.

COUNTIES—Poor Farms—May be Sold in Lots or as a Whole—Timber Only May be Sold—County May Not Build Houses on Lots For Sale. (§)

HONORABLE A. R. BEANE
Chairman, Board of Supervisors of
Lancaster County

March 23, 1960

This is in reply to your letter of March 18, 1960, which reads as follows:

"Lancaster County is in the act of arranging for the construction of a new wing to the Court House and Jail Building in order to comply with the standards set by the Department of Welfare and Institutions concerning our jail and in order to provide certain additional office
space and quarters for a jailer. In connection with the financing of this project two schools of thought have developed as follows:

"The County owns approximately 410 acres of land which was acquired in 1865 to act as a poor house farm. In recent years this land has not been devoted to any public use since the activities of the Counties in connection with poor houses have been taken over by the Department of Public Welfare. It is my contention and that of a very considerable number of citizens of the County that this capital asset not now devoted to public use nor needed by the County in the foreseeable future should be sold and the proceeds devoted to the costs of the new capital improvements to the Court House and Jail. It is our belief that the proceeds of this sale together with a very small surplus now held by the County will be sufficient to meet these new costs.

"A number of citizens in opposition to our view contend that merely the timber should be sold off the poor house farm and the land retained. This type sale would produce about one-third only of the necessary costs of the new construction and the proponents of this plan suggest that the poor house farm after the sale of the timber be reforested and developed in a commercial manner. This will take a considerable portion of the proceeds of the timber sale or an outlay of current tax income.

"It is our feeling that the County should not indulge in the commercial development of land which will place it in competition with individual owners of timber land in the area and in competition with commercial developers of residential property. It is further our feeling that where the County owns a capital asset not now needed for public use and needs a new capital development such as the additions to the Court House and Jail, the proper use of the poor house farm would be to furnish the necessary capital for the new developments.

"It has occurred to me that there may be certain restrictions upon the activities of the County which would in fact prevent or forbid the County from using the poor house farm for commercial development as outlined by the second group of citizens mentioned above, and I would appreciate it very much if you would advise as to whether or not under the law it is proper for Lancaster County to engage in commercial land development of its now useless poor house farm tract. It will be noted that the development of the poor house tract on a commercial basis would necessitate the use of the tax funds of the citizens of the County."

On February 9, 1960, we furnished Honorable E. Garnett Mercer, Jr., Commonwealth's attorney of your county, an opinion relating to the power of the board to sell the property in question and to the procedure to be followed. I enclose copy of that opinion. The opinion furnished to Mr. Mercer does not discuss the question of the power of the board to develop the property commercially.

§ 63-328 of the Code, to which I referred in my opinion, is as follows:

"The governing body of any county having a poor farm may, in its discretion, sell at public or private sale the land and buildings and other property constituting such poor farm, on the best terms obtainable, and such board may, in its discretion, make sale of the timber on such farm separate and apart from the land and buildings, and may sell the land and buildings in lots or as a whole as to the governing body may seem best, and convey the same by proper deed to the purchaser or purchasers thereof; and in the event such poor farm be so sold, the
governing body shall make proper provision for the care and mainte-
nance of the poor of the county in such manner as it may determine
upon. 'The sum derived from the sale or sales hereby authorized shall
be paid into the county treasury.'"

You will note that under this section the property may be sold in lots or
as a whole, as the governing body deems best. If the board should decide to
sell the property in lots suitable for residential purposes, such action would,
to that extent, be in competition to developers of residential property, but, in
my opinion, the board is vested with such authority. The board, however, in
my judgment, does not have authority to develop a residential section to the
extent of building houses on the lots. I think the board would be limited to
dividing the property into lots suitable for building purposes. The Code
section under consideration authorizes the board to sell the property in such
manner as, in its judgment, will bring the best price.

I call attention to the provision in this section which requires that the proceeds
of the sale shall be paid into the county treasury. The board would have the
power to appropriate the funds so received for any valid purpose for which the
general revenues of the county may be expended. The purposes mentioned in
the first paragraph of your letter come within the classification of proper ex-
penditures from the general fund.

With specific reference to the third paragraph of your letter, I call attention
to § 10-48 of the Code, which is as follows:

"Each of the several counties, cities and towns in this Commonwealth,
acting through its governing body, is authorized to acquire by pur-
chase, gift or bequest such tracts of land suitable for the growth of
trees as may be available and as such governing body may deem it
wise to acquire, and to administer the same, as well as any lands now
owned by any such county, city or town and suitable for the growth
of trees, as county, city or town forests."

In my opinion, the board of supervisors may, if it so desires, sell the timber
now on the land owned by it and may, under the provisions of § 10-48, reforest
the land. Under the provisions of § 10-50 of the Code, the county would be
ettitled to State aid from the Department of Conservation and Economic De-
velopment.

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COUNTIES—Sale of Surplus Poor Farm—Must be Approved by Court. (231)

February 9, 1960

Honoroble E. Garnett Mercer, Jr.
Commonwealth's Attorney for Lancaster County

This is in reply to your letter of February 5th, which reads, in part, as
follows:

"On January 29, 1887, the County of Lancaster acquired a tract of
land consisting of something over 300 acres, which was acquired with
the intent that the same be used as a place for the reception of the
poor of Lancaster County. The deed under which the land was con-
voyed to the County contained the following recital: 'To be held as a
poor house farm for the County.' Thereafter this parcel of land was,
in fact, used for many years as a place for the reception of the poor
of the County and has come to be known as the 'poor house tract.' In recent years there has been no County need for a place for the reception of the poor, and this tract is really surplus property.

"The County Board of Supervisors is planning to make capital outlays for improvements and additions to the existing Court House building and is giving consideration to the making of a disposal of this tract in whole or in part, in order to raise the necessary funds for the planned improvements and additions to the Court House property.

"In view of Sections 63-328 and 15-692 of the Code of Virginia, it would be very much appreciated if your office would advise me whether or not the Board of Supervisors must obtain the approval and ratification of the Court in making disposition of the aforementioned poor house tract as follows:

"1. A sale of all merchantable timber on the poor house tract.
"2. A sale of a part of the land and timber.
"3. A sale of the entire property, including timber and land."

The provisions of Section 63-328 and 15-692 of the Code, with an exception that is not material to your inquiry, were contained in Section 2723 of the Code of 1919, which was last amended by Chapter 312, Acts of 1934. When the Code was revised in 1950, Section 2723 was divided so as to place one part in Section 15-692 and another part in Section 63-328. That portion of old Section 2723 carried over to Section 63-328 relates to the power of the governing body to sell timber on a poor farm separate and apart from the land and buildings and to sell the land and buildings in lots or as a whole, as the judgment of the governing body may determine.

It is clear that prior to the Code of 1950, the approval of the Court was necessary to consummate a sale of a poor farm as a whole or in lots, and that under that section no authority was vested in the governing body to sell the timber separately without prior approval of the court.

There have not been any amendments to Section 2723 since the Act of 1934. Therefore, I am of opinion that the separation of Section 2723 of the Code of 1919 into two sections when the Code was revised in 1950 does not have the effect of removing the restrictions with respect to the sale of the property included in former Section 2723.

It is doubtful whether any person interested in buying would be willing to do so unless the sale is approved by the court.

COUNTIES—Sanitary Districts—No Authority to Impose Special Assessment Upon Abutting Landowners. (368)

June 1, 1960

Honorable Wm. M. McClenney
Commonwealth's Attorney for Amherst County

This is in reply to your letter of May 27, which reads as follows:

"Please furnish me with your opinion on the following question:

"Amherst County has a Sanitary District and desires to extend water lines in a portion of that district but wishes to impose an assessment of $1.00 per foot upon the land owners who would abut the highway down which this line would run. Does the county have this power
under Section 21-118 or any other section of the Code of Virginia? I have looked at Section 170 of the Virginia Constitution and Section 15-669 of the Code of Virginia and feel that since Section 170 of the Constitution does not mention Sanitary Districts and Section 15-669 does not mention Sanitary Districts I would like to have your opinion upon this matter."

In my opinion the governing body of a county in which a sanitary district is created under Chapter 2, Title 21 of the Code, does not have authority to impose an assessment of the nature described in your letter. Paragraph (6) of Section 21-118 of the Code and the first paragraph of Section 21-119 authorize levies of general application, but do not authorize special assessments.

Moreover, the General Assembly is not empowered to authorize counties having a population of less than five hundred inhabitants per square mile to impose assessments against abutting landowners. See Section 170 of the State Constitution.

COUNTIES—Sanitary Districts—Sewer System—Board of Supervisors May Contract for Construction—Sewer Authority May be Established. (39)

HONORABLE W.M. M. McCLENNY
Commonwealth's Attorney for Amherst County

This is in reply to your letter of July 22, 1959, which reads as follows:

"I would appreciate your opinion on the following question. May the Board of Supervisors of a county which has a Sanitary District enter into a contract for the erection of a sewer system by a contractor whereby the contractor will put up all funds and be reimbursed over a period of years from the revenues derived from such a system. This to be done without a referendum and in a section wherein more than eighteen per cent of the assessed value of the real estate of such district is already outstanding for other utility bonds.

"I would appreciate your advice also as to whether a sewer authority as defined under Va. Code 15-764.1 etc. may be established for a Sanitary District for the purpose of installing a sewer system."

I am assuming that the sanitary district which exists was established pursuant to the provisions of Chapter 2, Title 21 of the Code of Virginia.

The Supreme Court of Virginia has held that a contract of the nature presented in your first question is not repugnant to the provisions of Section 115 (a) of the Constitution. Farquhar v. Board of Supervisors, 196 Va. 54. This case appears to be in point. Accordingly, I am of the opinion, if the proposed contract is similar to the contract under consideration by the Court in the case cited, that the Board of Supervisors has the authority to enter into such a contract. I suggest that it might be well to obtain a copy of the Arlington County contract for guidance, and especially do I suggest that the paragraph appearing as a footnote on page 60 of the opinion be used by your county.

With respect to your second question relating to the Virginia Water and Sewer Authorities Act as contained in Chapter 22.1 of Title of the Code, in my opinion the territorial extent of an authority established thereunder may be limited to a sanitary district.

February 9, 1960

HONORABLE RICHARD J. WEBBON
Executive Secretary
Princess Anne County Board of Supervisors

This is in reply to your letter of January 22, 1960, which reads, in part, as follows:

"In order to determine the legal status of legislation proposed by the Princess Anne County Board of Supervisors, your office is, by this official letter, requested to submit an opinion regarding the following items:

"Item 1—Proposal by the Board of Supervisors to levy a utilities and use tax on consumers of public utilities services as set forth in the enclosed resolution.
"Item 2—Proposal to levy a cigarette tax in an amount not to exceed 2% as set forth in the enclosed resolution.

"The purposes for which the taxes are to be levied are to provide certain funds for necessary school construction and by so doing to relieve the burden which may be placed upon real property owners for such construction.

"There appears to be a difference of opinion regarding the legality of such action by the Board of Supervisors, therefore, at your request I have set forth the references in the Code of Virginia, the Charter of the City of Norfolk, and the Constitution of Virginia which I feel may apply to the problem.

"The Acts of Assembly—1948 Chapter 34 Page 76 amended of the Charter of the City of Norfolk by adding a new section (2-b) to provide for a utility tax and to validate prior collections.

"Section 15-10 of the Code of Virginia authorized counties under certain territorial classifications with relation to cities the same powers conferred upon city councils unless some provision of the Constitution of Virginia or the Constitution of the United States has been violated in such enactment."

Under the Charter provisions as they appear in Chapter 34, Acts of 1948, it would appear that the city of Norfolk may enforce an ordinance providing for the levy and collection of a consumer tax upon public utility services. Fallon v. City of Roanoke, 190 Va. 564. The city, it would appear, may also levy a cigarette tax under the provisions of Section 68 of its Charter (Acts of 1952, Chapter 18).

The Charter provisions are special acts, enacted pursuant to the provisions of Section 117 of the State Constitution, and not powers delegated to cities throughout the State under general law.

The question presented is whether or not under the provisions of Section 15-10 of the Code, the county of Princess Anne may enact a valid ordinance providing for a public utility tax and retail sales tax upon cigarettes.

Section 15-10 of the Code provides that the board of supervisors of counties in one or more of the classifications (1) through (4) "are vested with the same powers and authority as the councils of cities and towns by virtue of the Constitution of the State of Virginia or the acts of the General Assembly passed in pursuance thereof."
I understand that Princess Anne county comes within one or more of the classifications. In my opinion, the provisions of Section 15-10 of the Code relate to the powers granted to cities and towns under general law and not those powers specially granted in charter provisions. I am constrained to arrive at this conclusion by reason of the decision of our Supreme Court of Appeals in the case of Smith v. Kelly, 162 Va. 645, wherein a similar statute was construed.

COUNTIES—Soil Conservation—Road Bank Stabilization—Highway Funds. (168)

November 27, 1959

HONORABLE JOHN H. DANIEL

Member of the House of Delegates

This is in reply to your letter of November 15, 1959, in which you posed two questions:

"1. Does a County Board of Supervisors have the right to authorize the State Highway Department to use funds, allocated to said county for secondary road construction and maintenance, for road bank stabilization located in watershed districts?

"2. Does a County Board of Supervisors have the right to appropriate money from the general fund to a soil conservation district to cover a part of the cost of the acquisition (legal and recording fees) of easements in watershed districts?"

In answer to your first question, please be advised that funds allocated to a county for expenditure on the secondary system of roads in that county are not local funds. With the exception of the authority to make recommendations as to the expenditure of such funds, the governing body of a county has no control over the disbursement of these moneys. A county board of supervisors may recommend that allocated highway funds be expended by the State Highway Department for road bank stabilization in watershed districts for that portion thereof lying within the county, but the Highway Department should not follow such recommendation unless it deems such expenditure to be necessary and proper for maintenance of the secondary road or roads involved. Your attention is directed to § 33-47 of the Code of Virginia which provides for conferences between representatives of the Highway Department and the governing body of a county.

As to your second question, you will recall that § 15-11 of the Code, formerly § 2734, permits the board of supervisors of any county to apply and expend annually, out of the general county levy of the county, a sum not exceeding $2500.00, "for the purpose of promoting agriculture in the county." Chapter 1, as amended, of Title 21 of the Code, dealing with soil conservation districts and watershed improvement districts plainly states that the purposes of both soil conservation districts and watershed improvement districts include the promotion of agriculture in the area covered by such districts. It follows that if a county board of supervisors deems it appropriate, it may appropriate money from the general fund to a soil conservation district to cover a part of the cost for the acquisition of easements, within the statutory limits. In 1936 and in 1946, the then Attorney General reached a similar conclusion in two opinions in dealing with two questions closely related to your second question. These opinions are found in the Report of the Attorney General, 1936-37, page 22, and Report of the Attorney General, 1945-46, page 10. I enclose copies of these opinions.
I would suggest that any resolution of a board of supervisors appropriating funds for this purpose include a recital that such funds are being appropriated for the promotion of agriculture, pursuant to the authority conferred upon the board by § 15-11 of the Code of Virginia.

COUNTIES—Subdivision Ordinances—Streets—Width and Standards of—Established Subdivisions Not Governed by Newly Adopted Ordinances. (339)

HONORABLE H. SELWYN SMITH
Commonwealth’s Attorney for
Prince William County

May 6, 1960

This is in reply to your letter of April 22, 1960, in which you discuss the problems confronting the Board of Supervisors of Prince William County due to builders developing areas that have been subdivided, and plats put to record, prior to the date of the recently adopted subdivision ordinance. The old subdivisions are substandard as compared to the present day requirements.

You ask to be advised as to whether a builder or developer who buys in an old recorded subdivision area can be forced to dedicate a street wider than that originally laid out on the plat in order to meet present day requirements. You also inquire if the builder or developer can be required to construct streets to present day standards even though the present ordinance was not in effect at the time of the recordation of the subdivision plat.

As a rule, a statute or an ordinance will not be construed as operating retrospectively unless it so provides by express language or by necessary implication. It is possible for legislative bodies to pass curative or retrospective laws, provided they do not impair the obligation of contracts, disturb vested rights, or have ex post facto effect.

Neither Article 2, Chapter 23 of Title 15 of the Code of Virginia, nor the Prince William County Subdivision Ordinance, contains any language which indicates any intention on the part of the legislative bodies to apply the subdivision restrictions or standards to land subdivided prior to the enactment of the ordinance. The contrary appears to be the case, the principal purpose being to regulate the establishment and development of future subdivisions.

I am, therefore, of the opinion that the present requirements of the Prince William County Subdivision Ordinance relating to dedication of streets and the construction thereof cannot be applied to developers or builders in subdivisions which were created pursuant to the then applicable statutes or ordinance prior to the effective date of the present ordinance.

You are aware, however, that there is no obligation upon the State or County to maintain the streets in question or spend any funds thereon until there has been a compliance with the minimum requirements of the State Highway Commission for the secondary system of State highways.

You also inquire as to whether the County could notify prospective buyers in substandard subdivisions that the streets were not and would not become a part of the secondary system of State highways until minimum State requirements were met.

While I would advise against the posting of public signs upon rights-of-way which the County and State do not intend to accept as parts of the secondary system of State highways, I, nevertheless, am aware of no legal objection to the Board of Supervisors notifying prospective buyers in substandard subdivisions that the streets therein will not be maintained at public expense until minimum standards have been met.
COUNTY AND MUNICIPAL COURTS—Fees—Clerk May Collect Additional Fee Provided for Filing Report Pursuant to Section 46.1-413 of Code.

HONORABLE WILLIS V. FENTRESS
Judge, Civil Justice Court of the City of Norfolk

June 30, 1960

This is in reply to your letter of June 28 in which you refer to Section 46.1-413 of the Code, as amended and reenacted by Chapter 179, Acts of General Assembly of 1960, and in which you request my advice as to whether the fifty cents fee provided for therein may be collected by courts not of record in addition to the $3.00 fee allowed under Section 14-133 of the Code.

The fee of fifty cents provided for in Section 46.1-413 may, in my opinion, be collected in addition to the fee allowed under Section 14-133 of the Code. The fifty cents fee allowed under this section applies only to services performed in connection with filing reports relating to special types of cases involving the motor vehicle statutes. This section and Section 14-133 were both amended and reenacted at the recent session of the General Assembly by Chapters 179 and 106 of the Acts of 1960, respectively. The fees allowed in Section 14-133 are fees for services in connection with a pending suit in a court not of record. The fee allowed in Section 46.1-413 is a fee for additional services rendered after a suit has been ended. In my opinion, effect must be given to the fees provided for in both sections.

HONORABLE FRED W. BATEMAN
Senator Elect, 31st Senatorial District

December 8, 1959

This will reply to your letter of November 17, 1959, in which you call my attention to Chapter 141 of the Acts of Assembly (1958) establishing a charter for the Consolidated City of Newport News, effective July 1, 1958, Chapter 24 of which provides for certain courts of record in the Consolidated City to become effective July 1, 1960. In this connection you present the following inquiries:

“(1) Is it possible to have a judicial circuit wherein there is no circuit court by name?
“(2) Is there any advantage (other than appointments to the Virginia State Bar Council) in being in a judicial circuit?
“(3) Assuming your answer to question (1) is in the affirmative, is there any reason why the Legislature could not provide a 39th Judicial Circuit to include the City of Newport News?
“(4) May the General Assembly, under that part of Section 98 of the Constitution pertaining to cities containing 30,000 inhabitants or more, provide courts of record other than the circuit courts, and in so doing eliminate the circuit court?”

The above quoted questions will be considered in the order stated.

(1) I have been unable to discover any provision of the Virginia Constitution which specifically requires that each judicial circuit have a circuit court by name. I am, therefore, of the opinion that it would be permissible for
the General Assembly to establish a judicial circuit which does not contain a circuit court, so named.

(2) I am unaware of any other advantage.

(3) Section 94 of the Constitution of Virginia (1902) provides that the "judicial circuits of the State shall continue as at present until changed as hereinafter provided". Section 95 of the Virginia Constitution prescribes:

"The General Assembly may rearrange the said circuits and increase or diminish the number thereof. But no new circuit shall be created containing, by the last United States census or other census provided by law, less than forty thousand inhabitants, nor when the effect of creating it will be to reduce the number of inhabitants in any existing circuit below forty thousand, according to such census."

In light of these provisions of the organic law of the Commonwealth, I am of the opinion that it would be permissible for the General Assembly of Virginia to create an additional judicial circuit to include the Consolidated City of Newport News.

(4) Prior to the 1950 amendment of Section 98 of the Virginia Constitution, the third paragraph thereof provided:

"In each city of the first class, there may be, in addition to the circuit court, a corporation court. In any city containing thirty thousand inhabitants or more, the General Assembly may provide for such additional courts as the public interest may require, and in every such city the city courts, as they now exist, shall continue until otherwise provided by law." (Italics supplied).

As amended, the provision in question now prescribes:

"In each city of the first class, there may be, in addition to the circuit court, a corporation court. In any city containing thirty thousand inhabitants or more, the General Assembly may provide for a court or courts with such number of judges for each court as the public interest may require, and in every such city the city courts, as they now exist, shall continue until otherwise provided by law." (Italics supplied).

In light of the language contained in the third paragraph of Section 98 of the Virginia Constitution, as amended, I am of the opinion that—with respect to cities containing thirty thousand inhabitants or more—the General Assembly is authorized to provide for such courts of record as the public interest may require, including or excluding a circuit court, so named; and that in exercising this authority, the General Assembly may eliminate an existing circuit court.

COURTS—Juvenile and Domestic Relations—Support of Child Committed to State Agency—Parent May be Required to Contribute. (44)

HONORABLE KERMIT V. ROOKE, Judge
Juvenile and Domestic Relations Court

This will reply to your letter of July 24, 1959, in which you call my attention to Sections 20-61 and 16.1-185 of the Virginia Code, and request to be advised whether or not a juvenile and domestic relations court is empowered to require
the parents of a child, who has been committed by the court to an institution or agency, to contribute to his support—if the child in question is seventeen years of age and not crippled or otherwise incapacitated.

In pertinent part, Section 20-61 prescribes:

"Any husband who without just cause deserts or wilfully neglects or refuses or fails to provide for the support and maintenance of his wife, and any parent who deserts or wilfully neglects or refuses or fails to provide for the support and maintenance of his or her child under the age of seventeen years, or child of whatever age who is crippled or otherwise incapacitated for earning a living, the wife, child or children being then and there in necessitous circumstances, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not exceeding five hundred dollars, or confinement in jail not exceeding six months, or in the case of a husband or father be sentenced to the State convict road force at hard labor for a period of not less than ninety days nor more than twelve months or both; * * *.

This and related provisions of the Virginia Code are set out in Chapter 5 of Title 20, entitled "Desertion and Non-support". In substance these laws were formerly embodied in Chapter 80 of the Code of Virginia (1936) under the same title. In Heflin v. Heflin, 177 Va. 385—a suit involving husband and wife—the Supreme Court of Appeals of Virginia, commenting upon the nature of these statutes and the proceedings authorized thereunder, observed, 177 Va. at 398:

"Under the desertion and non-support statutes the wife is compelled to have her husband adjudged guilty of a crime and must be destitute and in necessitous circumstances before she can receive the meager wages he earns for work on the road force. This crime must be proven as all other crimes—the guilt of the husband must be shown beyond all reasonable doubt. If he is found guilty he may appeal, but no provision is made for the deserted wife's appeal if he is not found guilty.

"These statutes do not, in terms or otherwise, wipe out the other remedies of a deserted wife. They do not purport to embrace all other remedies for support which may arise, such as those under the divorce statutes and those brought under the inherent jurisdiction of an equity court for separate maintenance alone. The statutes embrace only those cases 'arising under this act,' which means cases in which deserted wives wish to prosecute their husbands criminally and as an incident, if found guilty, to receive their wages if they are physically able to work on the roads. It is an effective means to require them to perform their legal duty.

"The statutes provide an additional and quick remedy, in cases arising under it, to punish the guilty husband for his offense and at the same time prevent the wife from becoming a public charge. They give no civil remedy."

Section 16.1-185 of the Virginia Code provides:

"Whenever a child is committed by the court to any institution or agency, public or private, the court may, after giving the parents reasonable opportunity to be heard, order and decree that such parents shall pay in such manner as the court may direct such sum, within their ability to pay, as will cover in whole or in part the support of such child; and if the parents wilfully fail or refuse to pay such sum, the court may proceed against them as for contempt or for nonsupport. When payment is ordered to be made to the court, the court shall, on
or before the tenth day of the month following receipt thereof, forward such payment to the institution or agency, public or private, to which such child has been committed."

In light of the observations of the Supreme Court of Appeals of Virginia in *Heflin v. Heflin*, supra, with respect to the non-exclusive character of the remedy provided by Section 20-61 et seq. of the Virginia Code for the limited class of non-support cases arising under the terms of Section 20-61, I am constrained to believe that these statutes do not curtail the power conferred upon juvenile and domestic relations courts by Section 16.1-185 of the Virginia Code. It does not appear that the separate statutory provisions under consideration are in conflict. The former statutes provide a remedy, criminal in nature, to redress the nonsupport by parents of children under the age of seventeen years (or children of whatever age who are crippled or otherwise incapacitated for earning a living) provided such children are then and there in necessitous circumstances. However, the obligation of parents to support their children exists regardless of whether or not such children are destitute or in necessitous circumstances. If a child has been committed by a juvenile and domestic relations court to an agency or institution, this obligation may be enforced by the juvenile and domestic relations court in question pursuant to the authority conferred and in the manner prescribed in Section 16.1-185 of the Virginia Code.

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**COURTS NOT OF RECORD—Mayor's Court—May Not Try Charge on State Criminal Warrant. (57)**

**Honorable Ernest W. Goodrich**  
Commonwealth's Attorney for Surry County  

August 18, 1959

This is in reply to your letter of August 17, 1959, which reads as follows:

"The question has arisen in the Town of Claremont whether or not the Mayor of the Town, who is empowered by the Charter to try cases for violation of the Town ordinances, can try a person charged on a State warrant with violation of the motor vehicle law committed within one mile of the corporate limits of the Town.

"In this particular case, an individual was chased out of the corporate limits by the Town Sergeant and clocked at ninety miles per hour within one mile of the corporate limits.

"I am not certain whether the Mayor can try a person charged on a State warrant, and would appreciate the advice of your office."

Under Section 15-560 of the Code the jurisdiction of the corporate authorities of towns in criminal matters extends one mile beyond the corporate limits of the town. This jurisdiction, however, has reference to violations of town ordinances. I know of no statute which authorizes the Mayor of a town to try cases involving violations of State laws. Of course, the town may adopt ordinances in many instances paralleling State laws, such as the motor vehicle statutes. Under Section 46.1-180 of the Code the governing body of a town may adopt ordinances to regulate the operation of vehicles in the towns not in conflict with the provisions of Title 46.1 of the Code. The Mayor would have authority to try a case where the warrant charges a violation of the town ordinance."
REPORT OF THE ATTORNEY GENERAL

COURTS OF RECORD—Reports of Cases Disposed of—Supreme Court of Appeals Determines Whether Judgments Confessed Should be Reported.

HONORABLE DANIEL WEMYOUTH, Judge
Twelfth Judicial Circuit

This is in response to your letter of July 3, 1959, inquiring if judgments confessed in the clerk's office should be reported to the Supreme Court of Appeals of Virginia under Section 17-57, Code of Virginia, as actions at law. Reference is also made to Sections 8-141, 8-357, 8-365 and 8-366, and Walker v. Temple, 130 Va. 567, as indicating that such confessed judgments should be classified as actions at law.

Upon consideration of the foregoing, this office is of the opinion that confessed judgments are statutory proceedings which bear many of the characteristics of actions at law and might be placed under the general classification of actions at law for certain purposes.

With regard to whether or not they should be reported pursuant to said Section 17-57, it is noted that that section calls for a report of the business disposed of by each court. This section, it will be noted, provides that the report "shall contain such information as the Supreme Court of Appeals deems proper to enable it to gain a fair knowledge of the business of the several courts of the State". It would seem, therefore, that the Supreme Court would determine whether such judgments should be reported. The office of the Executive Secretary of the Supreme Court of Appeals of Virginia advises that there is no uniform administrative practice with regard to the reporting of confessed judgments.

CREDIT UNIONS—Interest on Loans—May Collect by Discounting Note or Other Evidence of Indebtedness.

HONORABLE SIDNEY C. DAY, JR.
Comptroller of Virginia

I am in receipt of your letter of January 20, 1960, in which you call my attention to Section 6-224 of the Virginia Code and inquire whether or not credit unions may discount loans so long as the rate of interest charged does not exceed one per centum per month computed on unpaid balances.

Section 6-224 of the Code of Virginia (1950) as amended provides:

"A credit union may lend to its members at reasonable rates of interest, or invest, as hereinafter provided, the funds accumulated by it. The rates of interest shall not exceed one per centum per month computed on unpaid balances."

I find nothing in the above quoted statute which purports to prescribe the manner in which credit unions may collect interest charged upon loans to its members. The terminal sentence of the statute merely establishes the maximum rate of interest which credit unions may impose upon loans to its members and prescribes that such rate shall not exceed one per centum per month computed on unpaid balances. I am, therefore, of the opinion that Section 6-224 of the Virginia Code does not prohibit credit unions from discounting such loans, so long as the rate of interest charged does not exceed the maximum specified in the statute.
CRIMINAL LAW—Bail—No Offense to Fail to Appear After Posting Cash Bond. (334)

May 4, 1960

MRS. ANNIE B. PAYNE
Justice of the Peace
Madison, Virginia

This will reply to your letter of April 29, 1960, in which you present the following questions:

"If a person charged with a misdemeanor which could carry a jail sentence posts a cash bond for his appearance in County Court and is requested to appear in Court by arresting officer and he fails to appear would a warrant charging him with failing to answer be proper? "Does a Justice of the Peace or an arresting officer have the authority when a person is bonded to request him to appear in Court?"

I have been unable to discover any provision of Virginia law which makes it a criminal offense for a person, who has posted a cash bond for his appearance in a county court, to fail to appear before such court in accordance with the conditions under which he was admitted to bail. I am, therefore, of the opinion that no authority exists for the issuance of a warrant charging such a person with a failure to appear before the court in question.

Although a justice of the peace or an arresting officer may request an individual to appear in court in accordance with the terms under which he is admitted to bail, I am of the opinion that such request would have no legal significance.

CRIMINAL LAW—Blood Alcohol Test—Compliance with § 18-75.1 Not Required Where Arrested Several Days After Offense. (43)

August 3, 1959

HONORABLE WILLIAM A. JONES
Commonwealth's Attorney for Richmond County

This will reply to your letter of July 22, 1959, in which you call my attention to Section 18-75.1 of the Virginia Code, which relates to the procurement and handling of blood samples of persons accused of operating a motor vehicle while under the influence of alcoholic intoxicants in violation of Section 18-75 of the Virginia Code or a similar ordinance of some county, city or town. You then outline a situation in which an individual is charged by warrant with a violation of Section 18-75 of the Virginia Code and arrested several days after the alleged offense occurred, and you inquire whether or not the failure of the arresting officer to comply with the provisions of Section 18-75.1 of the Virginia Code at the time the warrant is served and the arrest is made would "have the effect of depriving the accused of admissible evidence which would or might have been in his favor, in violation of Section Eight of the Constitution of Virginia".

I am of the opinion that your inquiry should be answered in the negative. When the statute under consideration is read as a whole, I think it is manifest that its provisions are applicable in those instances in which an individual, charged with a violation of Section 18-75 of the Virginia Code, or a similar ordinance of some county, city or town, is arrested at the time the offense in question is committed or immediately thereafter, and that the right to a blood-alcohol determination contemplated by the statute is conferred only upon those so arrested. I do not believe that an individual arrested several days after the date of the
alleged offense would come within the purview of Section 18-75.1, and I am, therefore, of the opinion that the failure of the arresting officer to comply with the provisions of Section 18-75.1, under the circumstances concerning which you inquire, would not deprive an accused of any right secured to him by Section 8 of the Virginia Constitution.

You further request my opinion upon the following situation and inquire:

"A person who is being pursued by a police officer for a traffic violation eludes the pursuing officer. The officer makes a diligent search for the offender and finally locates him after a period of time. "Can the officer make an arrest in this instance without a warrant for a misdemeanor committed in his presence and, if so, after what interval of time?"

While I have been unable to discover any case in which the Supreme Court of Appeals of Virginia has had occasion to consider the precise question you present, the general rule with respect to the time within which an officer may make an arrest, without a warrant, for a misdemeanor or breach of the peace committed in his presence, is well stated in 6 C.J.S. 590, Arrest: Section 6, and 4 Am. Jur. 46, Arrest: Section 67, respectively, in the following manner:

"While peace officers are authorized to arrest without a warrant for an offense less than a felony committed in their presence, it is usually held that in order to be valid the arrest must be made at the time the offense, or any part of the offense, is being committed, or within a reasonable time thereafter, or upon fresh and immediate pursuit of the offender."

"In making an arrest without a warrant for breach of the peace or a misdemeanor, an officer must act promptly at the time of the offense. If he does not act immediately after the offense has been committed, he can thereafter make arrests only by procuring a warrant and proceeding in accordance with its terms. The same rule applies to an arrest made by a private individual in cases in which, if he acts immediately, an arrest without a warrant is permitted. In order to justify a delay, there should be a continued attempt on the part of the officer or person apprehending the offender to make the arrest; he cannot delay for any purpose which is foreign to the accomplishment of the arrest. . . . The shortness of the interval does not really determine whether the right to make the arrest without a warrant exists, but the delay merely throws light on the question whether the arrest was made as soon as the circumstances permitted. . . . The officer must at once set about the arrest and follow up the effort until the arrest is effected. A delay of half an hour in order to procure help in making the arrest may be reasonable, while a delay of two hours may be unreasonable, especially if the officer meanwhile is doing nothing connected with the arrest."

Supportive of these statements of the general rule are a number of decisions from various jurisdictions. See, Jackson v. Superior Court, 98 Cal. App. (2d) 183, 219 P. (2d) 879; Oleson v. Pincock, 68 Utah. 507, 251 Pac. 23. In the Oleson case, supra, the court observed (251 Pac. at 28):

"No hard and fast rule can, however, be laid down which will fit every case respecting what constitutes a reasonable time. What may be so in one case under particular circumstances may not be so in
another case under different circumstances. All that can be affirmed with safety is that the officer must act promptly in making the arrest, and as soon as possible under the circumstances, and before he transacts other business."

In light of the foregoing authorities, it is manifest that no dispositive answer can be given to the second question posed in your communication. Whether or not an officer could legally make an arrest without a warrant in the situation you outline would depend upon a consideration of the totality of the circumstances under which the arrest is made.

CRIMINAL LAW—Blood Alcohol Test—Testimony With Respect to at Trial For Drunk Driving. (37)

HONORABLE A. A. RUCKER
Commonwealth's Attorney for Bedford County

I am in receipt of your letter of July 9, 1959, in which you call my attention to Section 18-75.1 of the Virginia Code, which relates to the procurement and handling of blood samples of persons accused of operating a motor vehicle while under the influence of alcoholic intoxicants in violation of Section 18-75 of the Virginia Code or a similar ordinance of some county, city or town. Specifically, you point out those provisions of the statute in question which prescribe that:

"* * * any person arrested for a violation of Section 18-75 or similar ordinance of any county, city or town shall be entitled to a determination of the amount of alcohol in his blood at the time of the alleged offense as shown by a chemical analysis of his blood or breath, provided the request for such determination is made within two hours of his arrest. Any such person shall, at the time of his arrest, be informed by the arresting authorities of his right to such determination, and if he makes such request, the arresting authorities shall render full assistance in obtaining such determination with reasonable promptness.

* * *"

"The failure of the accused to request such a determination is not evidence and shall not be subject to comment in the trial of the case."

With respect to the provisions quoted above, you present the following inquires:

"In view of the fact that this section expressly makes it mandatory that the arresting officers inform the accused of his right to have the blood analyses made, is or is not the fact that the arresting officer did in fact so inform the accused of this right a fact which must be proved by the prosecution (presumably by the testimony of the arresting officer) in order to make out a prima facie case against the accused?

"Does the prohibition concerning comment which is contained in the last sentence of Section 18-75.1 mean that no prosecution witness is to mention blood test in any way, or does it mean that only the prosecuting attorney is not to comment upon the failure of the accused to request such a determination?

"If it is permissible for the arresting officer to testify that the accused was advised of his right to have the alcohol determination, is
it also permissible for the officer then to testify that the accused stated that he did not desire to have such a determination?"

With respect to your first inquiry, I am of the opinion that it is not necessary for the prosecution to establish upon its case in chief that the arresting officer did, in fact, inform an accused of his right to a blood-alcohol determination, in order to make out a *prima facie* case against the accused. The offense defined by Section 18-75 of the Virginia Code is that of driving or operating an automobile or other motor vehicle while under the influence of alcoholic intoxicants or drugs. Informing an accused of his right to a blood-alcohol determination is not an essential element of the offense with which he is charged, and I am constrained to believe that a failure on the part of the arresting officer to inform an accused of the right in question is properly a matter of defense to be asserted and established (if true) by counsel for the accused.

In connection with your second question, I do not believe that the prohibition enunciated in the terminal sentence of Section 18-75.1, quoted above, means that "no prosecution witness is to mention blood test in any way", but I am of the opinion that the prohibition does forbid a witness for the prosecution to state that an accused failed to request a blood-alcohol determination and does preclude comment upon this point by the prosecuting attorney.

In regard to your third question, it follows from the view expressed in the preceding paragraph that—although it is permissible for an arresting officer to testify that the accused was advised of his right to a blood-alcohol determination—it would not be appropriate for such officer "then to testify that the accused stated that he did not desire to have such a determination".

I have been unable to discover any decision of the Supreme Court of Appeals of Virginia in which the questions you present have been considered, nor has this office previously had occasion to render an opinion upon this matter, and I am informed that the practice of prosecuting attorneys in such situations varies widely throughout the Commonwealth. In light of what has been said above, I would suggest that the appropriate procedure to be adopted in cases of the type under consideration—a procedure which I believe would fully protect the interests of the prosecution without jeopardizing the rights of the accused—would be for the prosecuting attorney to present to the arresting officer the following question:

"At the time of the arrest, did you fully comply with the provisions of Section 18-75.1 of the Virginia Code and advise the accused of his rights thereunder?"

The arresting officer could supply a simple affirmative or negative response to the above quoted inquiry, without any comment upon the failure of the accused to avail himself of the opportunity to obtain a blood-alcohol determination. This procedure would establish for the prosecution the fact that the mandatory provisions of the statute had been fulfilled, without infringing the prohibition against comment upon the accused's failure to request a blood-alcohol determination.

CRIMINAL LAW—Double Jeopardy—Accused May be Charged for Violating both State and City Law in Same Act. (404)
Motor Vehicles—Reckless Driving—Violations in City and County Constitute Separate Crimes. (404)

June 28, 1960

HONORABLE LIGON L. JONES
Commonwealth's Attorney
City of Hopewell

This is to acknowledge receipt of your letter of June 23, 1960 in which you
stated in part: "Will you please advise me whether a defendant who is observed driving in a reckless manner in the City of Petersburg and is chased through Prince George County by the Petersburg authorities and continues his reckless driving through the City of Hopewell, and is arrested by both the Petersburg and Hopewell authorities for reckless driving in their respective communities, can plead double jeopardy to the charge in Hopewell if tried in Petersburg and convicted before the Hopewell charge is tried."

From what you state, apparently the defendant committed separate and distinct acts which constituted reckless driving within the City of Petersburg and the City of Hopewell. The trial for violating an ordinance of the City of Petersburg would have no affect whatsoever on the trial of an ordinance of the City of Hopewell.

It is my opinion that this defendant can be tried in both jurisdictions on a charge of reckless driving, and if he were tried first in the City of Petersburg, a plea of double jeopardy can avail him nothing when he is tried in Hopewell. This is in accord with the opinion of this office rendered on May 11, 1950 in a letter to the Honorable William D. Prince, Trial Justice for Sussex County, in which it was held that a defendant may be tried both in the Town of Stony Creek and the County of Sussex on charges of reckless driving where acts constituted reckless driving were committed in both jurisdictions resulting from the same escapade, found in the Opinions of the Attorney General 1949-1950, page 165, a copy of which is enclosed.

CRIMINAL LAW—Driving Farm Tractor on Highway While Drunk—Violation of § 18-75 of Code. (38)

July 31, 1959

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth's Attorney for Appomattox County

This is to acknowledge receipt of your letter of July 29 in which you ask my opinion on the following question:

"If a farmer operating a farm tractor drinks enough alcohol or other alcoholic beverages to bring himself under the influence of such beverage, is it a violation of our drunk-driving law."

I assume that the question relates to driving a farm tractor upon the highways. Section 18-75 of the Code of Virginia of 1950, provides in part:

"No person shall drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol \* \* \*" (Italics supplied.)

Section 18-76 provides that any person violating the provisions of Section 18-75 shall be guilty of a misdemeanor. Although Sections 18-75, 18-76, 18-77, 18-78 and 18-79, commonly known as the "Drunk Driving Act," do not specifically define the term "motor vehicle," a farm tractor certainly comes within the meaning of that term.

60 Corpus Juris Secundum, Page 109.

"A motor vehicle is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers or materials, and generally includes all vehicles propelled by any power other than muscular power, except traction engines and such motor vehicles as run only upon rails or tracks."
There is no reference in the so-called "Drunk Driving Act" to the Motor Vehicle Code so the definition found in Title 46.1 is persuasive but not necessarily conclusive in determining the meaning of that term. The Motor Vehicle Code (Title 46.1) defines the term "motor vehicle" to be: "Every vehicle as herein defined which is self-propelled or designed for self-propulsion * * *" The term "vehicle" in Paragraph 34 is defined: "Every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except devices moved by human power or used exclusively upon stationary rails or tracks. Certainly a farm tractor is a device upon which a person may be transported on the highways. My predecessor, The Honorable J. Lindsay Almond, Jr., expressed an opinion that driving a farm tractor under the influence of alcohol is in violation of Section 18-75 of the Code. See Annual Report of the Attorney General of Virginia, 1952-1953, Page 148. I am, therefore, of the opinion that if a person operates a farm tractor under the influence of intoxicants on the highways of the State, he is in violation of Section 18-75 of the Code of Virginia of 1950 as amended.

CRIMINAL LAW—Fireworks—Transportation in Interstate Commerce Not Prohibited by §§ 59-214 Et Seq. (29)

HONORABLE T. RYLAND DODSON
Associate Judge of the Municipal Court of Danville

This is to acknowledge receipt of your letter of July 13, 1959 in which you request an opinion of this office on the question of whether or not a person engaged in transporting fireworks in interstate commerce can be prosecuted in violation of Section 59-214 et seq. of the Code (Chapter 15, Title 59). You state that a resident of Pittsylvania County transports merchandise consisting of fireworks, some of which are prohibited from being used, transported or sold in Virginia and some of the fireworks can be legally disposed of within the State. This merchandise is transported by motor vehicle from other states to Virginia, South Carolina and Georgia. None of these vehicles have I. C. C. Licenses. You further state that some of this merchandise which is transported is so-called "illegal fireworks" consigned to persons in other states are transported at the same time in the same vehicle along with fireworks that may be legally disposed of and are being delivered to points in Virginia.

Your attention is invited to 15 Corpus Juris Secundum, Page 383:

"A state or municipality may not, by prohibitory legislation, directly interfere with an article which is lawfully in interstate commerce; but it is otherwise as to legislation which affects interstate commerce, if at all, only indirectly or incidentally, or is directed against an article which is inherently unworthy of commerce or is so disguised as to be a cheat."

I do not believe that the fireworks which are prohibited by the Virginia statute can be classified as articles which are inherently unworthy of commerce. Of course, a person who uses the same vehicle to transport fireworks which are prohibited under the Virginia statute with those which are not, certainly exposes himself to a possible criminal prosecution and the fireworks to seizure and destruction (Section 59-214.1 of the Code). Whether the merchandise is being transported in interstate commerce is a matter of proof depending upon the
facts and circumstances of each particular case. The licensing of the vehicle by the I.C.C. is not conclusive on this point as the vehicle could operate in such commerce although not properly licensed.

My predecessor, The Honorable J. Lindsay Almond, on September 11, 1952 expressed the following opinion in a letter to the Honorable Stirling M. Harrison, Commonwealth's Attorney for Loudoun County:

"Replying to your letter of September 3, I beg to advise that I have heretofore expressed the opinion that Section 59-214 et seq. of the Code of 1950, as amended, should not be construed so as to prohibit the bona fide movement of fireworks in interstate commerce."

I, therefore, concur with the views expressed by Judge Almond as set forth above.

CRIMINAL LAW—Obscenity Statute—Not Applicable to the Barter Theater.

(316)

April 19, 1960

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney
Nelson County

This is in response to your letter of April 12, 1960, which reads, in part, as follows:

"The Barter Theater, of Abingdon, which I understand is a State supported institution, is preparing to present a play entitled 'The Moon is Blue,' to audiences in Virginia this fall.

* * * *

"I will appreciate your opinion on whether or not the Barter Theater can legally present this play in Virginia under the newly enacted Obscenity Statute, or under any other pertinent statute."

The Barter Theater, as you point out in your letter, is a State-supported institution. The General Assembly has appropriated the sum of $15,000 for the operation of the Theater during the current fiscal year. You make reference to the "recently enacted Obscenity Statute," which is Chapter 233, Acts of Assembly, 1960. This Act adds to the Code of Virginia new sections numbered 18.1-227 through 18.1-236.3. These sections relate to obscenity, define the word "obscene" and provide that certain obscene acts shall be unlawful. Section 18.1-236.2(4) provides:

"Nothing contained in this article shall be construed to apply to:

"(4) The exhibition or performance of any play, drama, tableau, or motion picture by any theatre, museum of fine arts, school, or institution of higher learning, supported by public appropriation."

The effect of this provision of law is to exempt a "theater * * * supported by public appropriations" from the aforementioned provisions of law relating to obscenity. I am unable to find any other provision of law which is applicable herein. I am, therefore, of the opinion that the Barter Theater can legally present the play "The Moon is Blue."
CRIMINAL LAW—Operating Under Influence—Proof Necessary. (127)

October 15, 1959

HONORABLE KENNETH P. ASBURY
Commonwealth's Attorney for Wise County

I am in receipt of your letter of September 24, 1959, in which you call my attention to Section 18-75 of the Virginia Code which provides:

“No person shall drive or operate any automobile or other motor vehicle, car, truck, engine or train while under the influence of alcohol, brandy, rum, whisky, gin, wine, beer, lager beer, ale, porter, stout or any other liquid beverage or article containing alcohol or while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature.”

You present for consideration a situation involving a prosecution for violation of the above quoted statute, in which prosecution the evidence establishes that the accused, while driving a motor vehicle on the highway, was not under the influence of alcoholic intoxicants but tends to establish that the accused was under the influence of some narcotic drug. In this situation, you inquire whether or not, in order to sustain a conviction, it is necessary for the Commonwealth to prove:

1. The specific narcotic drug or other self-administered intoxicant or drug of whatsoever nature under whose influence the defendant is while driving;
2. That the narcotic drug or intoxicant or drug of whatsoever nature was in fact self-administered.

I am constrained to believe that your first inquiry should be answered in the negative. The statute under consideration makes it an offense, inter alia, for a person to drive or operate an automobile or motor vehicle “while under the influence of any narcotic drug or any other self-administered intoxicant or drug of whatsoever nature”. If the Commonwealth proves the accused operated an automobile on the highway and, at that time, was under the influence of some self-administered narcotic drug, the necessary elements of a violation of the statute under consideration have been established, and, in my opinion, it would not be incumbent upon the prosecution to demonstrate the specific narcotic drug involved.

With respect to your second inquiry, I am of the opinion that a necessary element of the offense defined by Section 18-75 of the Virginia Code under consideration in this instance is the self-administration of a narcotic or other drug, and that it would be necessary for the Commonwealth to establish that the drug in question was self-administered. However, I believe that common experience in connection with the use of drugs clearly demonstrates that, in almost every instance, they are self-administered, and this is true even though the use of drugs in a particular case may have been prescribed by a physician. Only in rare instances are individuals involuntarily subjected to drugs administered to them by others. I am, therefore, constrained to believe that a showing on behalf of the Commonwealth that an accused was under the influence of a narcotic drug while operating an automobile on the highway would, of itself, be sufficient—in the absence of evidence to the contrary—to support a finding that the drug in question was self-administered.

I regret that the pressure of business in this office has prevented an earlier reply to your communication.
CRIMINAL LAW—Poolrooms—Frequenting of by Minors—Restaurant Adjacent—ABC License. (193)

HONORABLE LIGON L. JONES
Attorney for the Commonwealth for the City of Hopewell

This is in response to your letter inquiring, "Is the front part of a poolroom which is entirely separate therefrom except for an opening that has no doors wherein food and beverages are served subject to the provisions of Section 18-313 * *". By subsequent letter of November 23, 1959, you further state, "* * an archway separates the poolroom from the restaurant. Approximately twenty-five percent (of the building) is occupied by the (licensed) restaurant and approximately seventy-five percent by the poolroom". You further inquire whether or not the said section prevents minors from frequenting the restaurant portion of the premises. The pertinent portion of Section 18-313, Code of Virginia, as amended, provides:

"No minor shall frequent, play in or loiter in any public poolroom or billiard room operated in conjunction with any establishment licensed under the Alcoholic Beverage Control Act, or be permitted by the proprietor thereof or his agent to frequent, play in or loiter in any such public poolroom or billiard room located outside of the corporate limits of towns and cities; and no minor under eighteen years of age shall frequent, play in or loiter in any other such public poolroom or billiard room so located."

The said section in question does not readily lend itself to interpretation that is free from doubt. Moreover, it appears that the paragraph in question may not be applicable in cities for reason that it prohibits minors from "such public poolroom * * located outside of the corporate limits of towns and cities, * *", and further provides that no minor under eighteen shall frequent "any other such public poolroom or billiard room so located".

With regard to the specific inquiry whether or not said Section 18-313 prevents such minors from frequenting the restaurant portion of the premises, it appears that the prohibition is limited to the "poolroom or billiard room" operated in conjunction with any licensed establishment. It would appear that the word "room" should be given its general meaning and the words "poolroom" and "billiard room" denote the room in which the game is played. The stated facts indicate that the restaurant and poolroom are located in separate rooms though joined by an open archway. Accordingly, I am of the view that Section 18-313 does not prevent such minors from frequenting the room in which the restaurant portion of the premises is contained.

CRIMINAL LAW—Poolrooms—Minors Loitering. (173)

MR. CHARLES E. REAMS, JR.
County Judge, Culpeper County

This is in response to your letter of November 18, 1959 in which you make reference to the provisions of Section 18-313 of the Code of Virginia, as amended, and make the following inquiry:

"The question posed here is whether or not there is any duty imposed upon the proprietor of the pool room located outside the cor-
porate limits of towns and cities where licenses under the Alcoholic Control Board Act are not involved, to deny the minors under eighteen years of age the use of pool rooms as a place to be frequented, played in or loitered in.”

The statute here considered reads in pertinent part as follows:

“No minor shall frequent, play in or loiter in any public poolroom or billiard room operated in conjunction with any establishment licensed under the Alcoholic Beverage Control Act, or be permitted by the proprietor thereof or his agent to frequent, play in or loiter in any such public poolroom or billiard room located outside of the corporate limits of towns and cities; and no minor under eighteen years of age shall frequent, play in or loiter in any other such public poolroom or billiard room so located.

“Any such minor and any such proprietor violating the provisions of this section shall be guilty of a misdemeanor and punished by a fine of not less than five dollars or by imprisonment in jail not more than six months or by both such fine and imprisonment.”

Prior to the 1958 amendment, the statute covered all poolrooms or billiard rooms located so as to be subject to its provisions. The minimum age was twenty-one years and all proprietors were punishable under the statute. The amending bill introduced in 1958 (House Bill 358) would, in its original form, merely have reduced the minimum age to eighteen.

As you have pointed out, the statute does not now provide for the punishment of proprietors of poolrooms or billiard rooms not operated in conjunction with establishments licensed under the A. B. C. Act where such proprietors have permitted persons less than eighteen years of age to frequent their establishments.

The provisions of the statute prior to the 1958 amendment; the amending bill in its original form; the statutory language and purposes, and the somewhat incongruous situation now obtaining wherein a proprietor of one type of poolroom can be held criminally responsible for permitting a twenty-year-old to frequent his establishment while the proprietor of another type of poolroom cannot be so held even though, for example, he permits an eight year old to loiter—all combine to demonstrate that, in amending House Bill No. 358 subsequent to its introduction, the General Assembly inadvertently omitted the language necessary to effectuate its probable intention of making poolroom proprietors criminally liable in such cases as you have mentioned.

Although the legislative intention is clear, the statutory language is such that I am doubtful that the implied duty imposed upon those proprietors covered by your inquiry could be enforced in a criminal proceeding.

CRIMINAL LAW—Receipt of Stolen Goods—Aid in Concealment Thereof—Venue. (248)

HONORABLE ELWOOD H. RICHARDSON, JR.
Commonwealth’s Attorney for the City of Hampton

February 24, 1960

This is in response to your letter of February 8, 1960, inquiring if Section 18-169, Code of Virginia, making it a crime to receive or aid in the concealment of stolen property, etc., has been violated in the City of Hampton by a person
who was apprehended in such city while transporting stolen property which he received into his automobile in York County, Virginia, as a part of a pre-arranged scheme with others working with him who had previously stolen the property in Baltimore, Maryland, and transferred it to such person in York County, Virginia.

Under the above factual situation, it would appear that Section 18-169 has been violated in the City of Hampton in two particulars. First, there is general authority to the effect that in establishing "concealment" or aid therein under similar statutes, it is sufficient if it is proven that the property was withheld from the owner and was made more difficult for him to recover the property. Commonwealth v. Matheson, 328 Mass. 371, 103 N. E. (2d) 714. To the same effect, see Wertheiner v. State, 201 Ind. 572, 169 S. E. 40, 68 A. L. R. 178. Accordingly, it would appear that the property was being withheld from the owner by the actions of such person and its recovery was being rendered more difficult by placing it in an automobile and transporting it away from its owner and the place from where it was stolen. As these matters were taking place in the City of Hampton, it would appear that there was aid in the concealment of such stolen property in such city.

Secondly, with regard to whether or not such person could be deemed to "receive" the property in the City of Hampton, I am of the view that such receipt is a continuing act which occurred in the City of Hampton by the actions of such person. Although the transfer took place in York County, Virginia, the person was giving effect to such receipt of the property by transporting it away from the place where he took possession to some other place. Reference is made to the case of Jolly v. Commonwealth, 136 Va., which discusses certain aspects of the venue of the court in such cases and touches upon the question presented. In this same connection, it would appear that quite often the original place where possession of the property is taken is not known, and there does not appear to be any authority requiring proof of the place where original possession occurred. Moreover, under the Virginia rule, receipt of stolen property can be established by circumstances. See, Stapleton v. Commonwealth, 140 Va. 475, 124 S. E. 237.

In accordance with the foregoing, it would appear that Section 18-169 has been violated under the facts presented in the City of Hampton.

CRIMINAL LAW—Sterilization—Physician Performing Such Operation With Consent of Patient Not in Violation of Section 18-70 of Code. (320)

HONORABLE CARTER R. ALLEN
Commonwealth's Attorney
Waynesboro, Virginia

This is in reply to your letter of April 20, which reads as follows:

"Please advise whether Chapter 9 of Title 37 of the Code of Virginia is the only procedure for lawful sterilization in Virginia, except when such is incidentally involved in a medical or surgical treatment for sound therapeutic reasons."

"If the Code Section is the only lawful authority for such operations primarily involving sterilization, would an operation primarily for sterilization performed outside of a mental hospital, and without compliance with the provisions of Chapter 9 of Title 37, be in violation of Section 18-70 of the Code as amended?"
I enclose copies of opinions which have been issued by this office relating to the subject presented in your letter:

- Opinion dated September 11, 1959, to Senator E. E. Haddock, which has not yet been published.

I also enclose copies of the two opinions referred to in the opinion furnished to Senator Haddock, as follows:

- Opinion dated December 12, 1957 to Dr. George S. Fultz, Jr. (not published)
- Opinion dated November 29, 1950 to Hon. Horace T. Morrison (not published)

It is exceedingly doubtful whether or not a physician could be convicted under the provisions of § 18-70 of the Code in a case where the consent of the person was obtained. Of course, the person would have to be capable in every respect of giving the consent. Usually consent of a person who has been assaulted is a good defense except where consent is obtained by fraud or where the peace and dignity of the State is involved. See Banovitch v. Commonwealth, 196 Va. 210, at page 219.

CRIMINAL LAW—Venue of Crime—Corporation Court of City has Jurisdiction Where Perjury Committed Within Corporate Limits—Exception Where Committed in County Courthouse Situated on Land Which is Part of County Though Actually Within City Limits. (1)

This is in response to your letter of June 26, 1959, inquiring if an offense (perjury) was committed in the Augusta County courthouse, which is located within the city limits of the city of Staunton, would it be tried in the county court where the alleged perjury took place, or would it be tried in the appropriate court for the city of Staunton.

In accordance with the opinion previously forwarded to you dated January 16, 1950, addressed to the Honorable Stirling M. Harrison, Commonwealth’s Attorney for Loudoun County, this office is of the opinion that the offense would be tried in the courts of the city in which the crime took place. In other words, if it occurred within the corporate limits of the city of Staunton, the appropriate court for the city of Staunton would be the forum in which the offense would be tried. Unless the territory where the courthouse of the Circuit Court of Augusta County is located is excluded from the corporate limits of the city of Staunton, I am of the opinion that the Corporation Court would have jurisdiction. I am unable to find any statute giving the Circuit Court concurrent jurisdiction with the Corporation Court in criminal matters.

In some cases, such as the Circuit Court of Henrico County, the Courthouse
Square is situated on land surrounded by the corporate limits of the city of Richmond, but the Square itself is excluded from being a part of Richmond. That may be the case with respect to Augusta County. You, I feel sure, are familiar with the situation at Staunton.

Perjury committed in the corporate limits of Staunton would be an offense within the jurisdiction of the Corporation Court of the city, although the crime may have been committed inside the Circuit Court courthouse located within the city.

CRIMINAL PROCEDURE—Bail Bonds—Qualification of Fidelity and Surety Companies—Guaranteed Arrest Bond Certificates—Local License Taxation. (241)

February 18, 1960

HONORABLE EDW. H. RICHARDSON
Commonwealth's Attorney for
Roanoke County

This is in reply to your recent letter in which you state, in part, the following:

"Since practically all bail bonds taken are in favor of the Commonwealth, Judge Hoback has requested me to ask your opinion as to whether or not Fidelity and Surety Companies, qualified to do business in Virginia, are permitted to go bail bonds, and if so, if there is any limit to the amount of bail bonds they may write. The Company in question, I understand, has qualified to transact fidelity and surety insurance in the Commonwealth of Virginia.

"The question further raised is, does the County of Roanoke, under its authority to require business licenses, have the right to impose a license tax upon a Fidelity and Surety Company writing bail bonds in Roanoke County, where in effect they are simply professional bondsmen?"

I am of the opinion that fidelity and surety companies doing business in Virginia under the provisions of §§ 38.1-639 through 38.1-657 of the Code of Virginia are qualified under the law to write bail bonds and, as a practical matter, such bonds are generally accepted as being sufficiently secured by the several judges of the courts of the Commonwealth. The limitations or the amount of bail bonds any such company may write are found in §§ 38.1-32 and 38.1-641, as amended.

Your attention is directed to §§ 38.1-644.1 and 38.1-644.2, relating to guaranteed arrest bond certificates, which prescribe that the maximum unqualified obligation of a surety company upon any such certificate is limited to $200.00. Of course, where an individual bond is written by a company in a particular case, this limitation is not applicable.

I am of the opinion, further, that the County of Roanoke does not have the power to impose a license tax upon a fidelity and guaranty company writing bail bonds in Roanoke County. Section 38-371.2, as amended, of the Code of Virginia, which permits the governing body of any county or city to require that persons entering into bonds for others for compensation shall obtain a revenue license, expressly exempts such companies by the last paragraph of the said section:

"Nothing in this section shall be construed to apply to guaranty, indemnity, fidelity and security companies doing business in Virginia under the provisions of §§ 38.1-269 to 38.1-657."
I regret that the press of work engendered by the current session of the General Assembly has prevented my responding to your inquiry before this time. I hope that you have not been inconvenienced by this delay.

CRIMINAL PROCEDURE—Costs of Jury—Violation of Town Ordinance—Upon Acquittal Costs Assessed Against Town. (218)

January 21, 1960

HONORABLE M. H. TURNBULL, Clerk
Circuit Court of Brunswick County

This is in response to your letter of January 15, 1960, and subsequent letter of January 20, 1960, inquiring as to who should pay the cost of the jury in a criminal prosecution for a misdemeanor under a town ordinance on appeal from the Mayor's Court to the Circuit Court when the defendant is found not guilty by the jury. It is further stated that fines collected, if there is a conviction under such ordinance, go to the town.

The cost of a jury constitutes an expense incident to the prosecution pursuant to Section 19-296, Code of Virginia, and should be taxed as a part of the costs against the losing party. As the prosecution was instituted for a violation of the town ordinance, with fines collected going to the town, and the verdict of acquittal was in favor of the accused, this office is of the opinion that the town should pay the cost of such jury. I am also advised that this is the procedure followed in similar cases in the Hustings Court of the City of Richmond where the prosecution is for the violation of a city ordinance.

CRIMINAL PROCEDURE—Evidence—Certificate of State Chemist Inadmissible in Prosecution for Poisoning Cats, Dogs and Livestock. (294)

March 31, 1960

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth's Attorney for Appomattox County

This is in response to your letter of March 29, 1960, relative to the poisoning of cats, dogs and livestock in Appomattox County. Your letter reads, in part, as follows:

"I would appreciate it if you would let me know if the dog dies and we have the stomach sent to the Department of Agriculture, Division of Chemistry, would a certificate from the State Chemist or one of his assistants be evidence in a trial against the landowner charging the landowner with violation of State Code Section 29-193, that is for the unlawful exposing of poison where it may be taken by a dog or livestock.

"I have made a hasty search of the Code of Virginia and cannot find a section permitting that the Certificate of the State Chemist can be received as evidence. It would be considerable inconvenience to have the State Chemist or one of his assistants to appear in Court here in Appomattox if we had a case."
There is no statutory provision contained in the Code of Virginia which authorizes the State Chemist to make such a certificate which could later be used as evidence in a criminal prosecution. Section 4-90 permits a chemist, employed by the A.B.C. Board, to make a certificate as to an analysis which he made, and such certificate is admissible in evidence in the absence of the chemist. The Court, however, may require the chemist to appear and testify. This procedure has been held to be constitutional. Runde v. Commonwealth, 108 Va. 873, 61 S. E. 792. Such certificate is properly admissible as documentary evidence as an exception to the Hearsay Rule when authorized by statute. Bracy v. Commonwealth, 119 Va. 867, 89 S. E. 144.

In the absence of statutory authority, I am of the opinion that a certificate made by the State Chemist would not be admissible in evidence under the circumstances set forth in your letter for the reason that such certificate is mere hearsay.

CRIMINAL PROCEDURE—Grand Jury—Charge to—Not to be in Presence of Prospective Juror in Criminal Case. (366)

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth’s Attorney
Appomattox County

May 27, 1960

This is in reply to your letter of May 14, 1960, which reads as follows:

“Judge Joel W. Flood of the Fifth Judicial Circuit has asked me to advise him as to whether or not the charge that must be given to a grand jury under Code Section 19-129 of the 1950 Code and amendments thereto must be made in public. He is interested in this question because of the recent act of legislature requiring that the charge shall not be delivered in the presence of a prospective juror that would serve on a criminal case.

“Therefore, will you give me the benefit of the opinion of your office as to whether or not it would be proper for the charge to be delivered by the Judge of a Court of Record in the grand jury room or in private or must the charge be delivered in public in the Court Room?”

By Chapter 467, Acts of Assembly, 1960, approved March 31, 1960, § 19-129 of the Code of Virginia was amended and re-enacted with the addition of the sentence:

“No person summoned pursuant to §§ 8-185 through 8-192 shall be present in the court room when said grand jury is charged; and the charging of said grand jury in violation of this provision shall constitute reversible error in any criminal case tried by a jury summoned pursuant to §§ 8-185 through 8-192.”

Further, Chapter 94, approved February 25, 1960, amended and re-enacted § 19-171 of the Code and added to its present text the proviso:

“provided, however, the court shall not charge the grand jury in the presence of any person so summoned who shall be selected as a juror to try any person indicated by said grand jury. A violation of this provision shall constitute reversible error in any criminal case which is tried by a jury composed of one or more such veniremen.”
These two amended Code sections, when read with § 19-172, as amended, prescribe that (a) no person summoned as a civil juror shall be present in the court room when the grand jury is charged (§ 19-129, as amended); (b) the court shall not charge the grand jury in the presence of any person summoned as a venireman in criminal cases (§ 19-171, as amended); (c) persons summoned as veniremen under § 19-171 may serve in felony, misdemeanor and civil cases (§ 19-172); (d) if a juryman summoned pursuant to §§ 8-185 through 8-192 is present at the charging of the grand jury for the term and then serves as a member of the jury in a criminal case during such term, the fact that he heard the charging of the grand jury is sufficient to constitute reversible error in such criminal case (§ 19-129, as amended); and (e) if a juryman in whose presence the grand jury was charged serves in the trial of any person indicted by such grand jury, this fact constitutes reversible error in such case.

I do not read into either of the amended statutes any requirement that the grand jury should be charged by the court in private, nor do I feel any inference to that effect should be drawn. The statutes specify "in the court room" and "to attend the court," leaving the clear implication that the charge should be given in open court, in accordance with established custom. I am of the opinion that the court, before charging the jury, should be assured that no person is in the court room whose name appears on the venire selected for the particular term. The attorney for the Commonwealth can further prevent error by asking on the voir dire, in a particular case, whether any prospective juror was present when the grand jury was charged.

As you are aware, Titles 18 and 19 of the Code were revised, rearranged, amended and recodified by Chapters 358 and 366, Acts, 1960, respectively, both of which Acts are effective July 1, 1960. In order to accomplish this end the General Assembly repealed Titles 18 and 19 and added new Titles 18.1 and 19.1. The Code Commission will probably give effect to the subject amendments to §§ 19-129 and 19-171 by incorporating them into the provisions of new §§ 19.1-154 and 19.1-196, respectively, unless some irreconcilable conflict between the amendments to Title 19 and the newly enacted Title 19.1 appears.

CRIMINAL PROCEDURE—Justices of Peace—Capias Pro Fine—Fees—Justice of Peace May Not Charge Fee for Receiving Fine. (327)

April 29, 1960

HONORABLE W. R. LUMPKIN
President
Association of Justices of the Peace

This is in reply to your letter of April 26, in which you present the following question:

"A capias pro fine is issued by the Clerk of the county court of a given county for a subject living in another county in Virginia. This capias pro fine is given to a State trooper for service, he in turn sends it to the State Police Administrative Headquarters and it is forwarded to a trooper where the subject lives. This trooper serves the capias and brings him before a justice of the peace where the defendant pays the capias pro fine. The justice of the peace accepts payment, issuing a receipt from the book furnished him by the Auditor of Public Accounts and forwards the capias, the amount collected and a copy of the receipt to the county court where it was issued.

"The question that we would like for your office to rule on is, can
the justice of the peace charge his two dollar bond fee for handling this
document?"

The statute relating to fees for a justice of the peace in criminal matters is
§ 14-136 of the Code, which reads as follows:

"A justice of the peace shall charge for services rendered by him in
criminal actions and proceedings the following fees only:

"(1) For issuing a warrant of arrest, or a warrant for violation of
any ordinance, including the issuing of all subpoenas, one dollar; pro-
vided, that when such fee is collected from the defendant or other
person for him, such fee shall be one dollar and fifty cents.
"(2) For issuing a search warrant, one dollar.
"(3) For admitting any person to bail, including the taking of the
necessary bond, two dollars, which shall, notwithstanding other pro-
visions to the contrary, be collected at the time of admitting the
person to bail, but which shall in no case be paid out of the State
treasury."

The facts stated by you do not reveal that the justice of the peace in such
a case admits to bail the defendant named in the capias pro fine. The justice
merely receives the fine and issues a receipt. The statute does not provide
for a fee in such cases.

In considering this matter, I have not found any statute under which a
justice of the peace is authorized to receive and issue receipts for fines. The
defendant named in a capias pro fine may, if he wishes, pay to the sheriff or
other officer the amount of the fine and costs and such officer is required to
account for the money in the manner prescribed in § 19-328 of the Code.
State police are vested with the powers of a sheriff (§ 52-8 of the Code) and
may collect upon a capias pro fine and issue a receipt therefor. Such officers
are required to execute a bond for the faithful performance of their duties.
Members of the State police, however, may not collect the commission allowed
sheriffs under § 19-322 of the Code, since this is prohibited by § 52-10 of the
Code.

I have discussed this question beyond the specific question presented by you
so that you and the other members of your association may decline to render
a service for which there is no provision by which you may be compensated.
I doubt the propriety of a justice of the peace performing any official service that
is not authorized by statute.

CRIMINAL PROCEDURE—Juvenile Offenders—Violation of Both State and
(63)

HONORABLE W. A. ALEXANDER
County Judge, Franklin County

This is in response to your letter of August 20, 1959, inquiring if a waiver
is required from a federal court pursuant to Section 16.1-158(1)(i) before
a child under eighteen can be prosecuted in a juvenile court for an offense
which constitutes a violation of both State and Federal law.
Section 16.1-158(1) (i) provides:

"* * * who violates any State or federal law, or any municipal or county
ordinance; provided, however, that in violations of federal law jurisdiction in such cases shall be concurrent and shall be assumed only if waived by the federal court.”

It is not stated whether or not the child has been arrested by federal authorities and charged for the federal offense. If no federal charge is pending, this office is of the opinion that the aforesaid waiver requirement would not be applicable and the said statute would not prevent prosecution in the juvenile court for a violation of State law. The wording of the statute does not appear to prevent proceedings for violation of State laws. However, if the child had been charged by federal authorities for violation of the federal law, then it would be necessary to secure a waiver from the federal court before a juvenile court could entertain proceedings against the child based upon the violation of federal and state law.

CRIMINAL PROCEDURE—Preliminary Hearing—Accused Entitled to Hearing in Each County Where Felony Committed. (335)

HONORABLE ERNEST P. GATES
Commonwealth’s Attorney for Chesterfield County

May 5, 1960

This is in reply to your letter of April 29, which reads as follows:

“In view of the passage of Senate Bill No. 310 by the 1960 Regular Session of the General Assembly, requiring a preliminary hearing upon the question of whether there are reasonable grounds to believe a defendant arrested on a felony warrant committed the offense prior to presentation to the Grand Jury, please advise what procedure I should follow under the following circumstances.

“The defendant, who was confined in the Virginia State Penitentiary and serving time for a felony conviction, escaped from a State Convict Road Camp in ‘A’ County. After his escape in ‘A’ County, he broke into a storehouse in said County and stole merchandise. Later, he stole an automobile in ‘B’ County and abandoned it in ‘C’ County where he stole another automobile. He proceeded to ‘D’ County where he broke into a house and stole a gun. He later shot a police officer in ‘E’ County when he was apprehended. At the time he was apprehended, he was arrested as an escapee and a warrant issued charging him with attempted murder among other offenses committed therein.

“Unless he waives the preliminary hearing in writing, is it necessary that he be given a preliminary hearing in ‘E’ County where he was arrested on a warrant? Also, should a hearing be given in each of the other Counties above mentioned where the felonies were committed?”

Senate Bill 310 (Chapter 389 of the Acts of Assembly, 1960) added a new section to the Code, numbered 19-137.1, and is as follows:

“No person who is arrested on a charge of felony shall be denied a preliminary hearing upon the question of whether there is reasonable ground to believe that he committed the offense and no indictment shall be returned in a court of record against any such person prior to such hearing unless such hearing is waived in writing.”

The statute under consideration, in my opinion, must be construed to require a preliminary hearing for the accused in each county unless the hearing
is waived in writing. The language of the statute seems to be clear and free from doubt as to its purpose. Therefore, I am of opinion both of the questions presented by you must be answered in the affirmative.

CRIMINAL PROCEDURE—Preliminary Hearing—Accused Arrested on Charge of Felony Entitled to. (397)

Honorable Emory L. Carlton
Commonwealth's Attorney for Essex County

This is in reply to your letter of June 21, which reads as follows:

"I would appreciate it if you would mail me a copy of your opinion concerning requirements of preliminary hearings in all cases prior to indictment for felony, unless waived by accused in writing. I understand that you have recently rendered an opinion construing Section 19-137.1 of the Code."

We have expressed our views with respect to this legislation by telephone, but up to now we have not rendered an official opinion.

We can find no constitutional objection to this legislation. In our opinion, the statute should be construed as referring only to "persons arrested on a charge of felony." As to such persons, no indictment should be returned by a Grand Jury prior to a preliminary hearing unless such hearing is waived in writing. As we interpret the law, a preliminary hearing is not necessary unless an accused has been actually arrested and charged with the commission of a felony.

CRIMINAL PROCEDURE—Warrants For Violation of City Ordinance—Clerk of Court of Record May Not Collect Fee of $1.00 as Part of Costs. (41)

Honorable Herman White
Judge, Civil and Police Court of City of South Norfolk

This is in reply to your letter of July 29, 1959, in which you ask whether you should collect and remit to the Clerk of the Corporation Court the clerk's fee authorized under Section 19-317 of the Code in cases involving criminal warrants for the violation of a city ordinance. The fines collected by your court, together with the costs, are paid into the city treasury.

Section 19-317 reads as follows:

"For the services of the clerk under the three preceding sections his fee shall be one dollar upon every such fine, which fee shall be included in the execution for cost or be retained by him when collected."

This office has heretofore ruled that Section 19-310 of the Code does not contemplate that the reports require therein shall include cases tried involving violations of municipal ordinances. Therefore, the list of fines reported by the Clerk to the Comptroller as provided in Sections 19-314, 19-315 and 19-316
of the Code does not include fines imposed in connection with city warrants for violations of city ordinances. Since the Clerk does not render the services for which a fee is payable under Section 19-317 of the Code, it follows that the fee should not be collected by your Court in cases where the criminal charge is for the violation of a city ordinance.

CRIMINAL PROCEDURE—Warrants—Separate Warrant May Be Issued For Each Offense. (228)

February 9, 1960

HONORABLE CHARLES G. STONE
Commonwealth's Attorney for Fauquier County

This is in response to your letter of February 5, 1960, in which you set forth a hypothetical situation which is summarized below:

A police officer stops John Doe who is driving his car on a highway and charges him with five separate offenses. Five separate warrants are issued by the Justice of the Peace, and Doe is tried in the County Court and convicted of all five charges.

You ask whether there is any provision of law which requires that the Justice of the Peace embody all five charges in a single warrant. There was formerly contained in the Code of Virginia § 14-137 which prohibited a justice of the peace from writing "unnecessary warrants." This section was repealed by the General Assembly in 1956 (Acts of Assembly, 1956, Chapter 556). I can find no similar provision contained in the Code of Virginia. There is, therefore, no section contained in the Code of Virginia which would require a justice of the peace to include all five charges, as set forth in the hypothetical situation, in one warrant.

CRIMINAL PROCEDURE—Witnesses—Grand Juries—Expenses of Non-Resident Witness. (221)

January 28, 1960

HONORABLE LIGON L. JONES
Commonwealth's Attorney for the City of Hopewell

This is in response to your letter of January 26, 1960, inquiring as to the provisions of law and the availability of funds for the payment of transportation from Jacksonville, Florida, to Virginia, and return, for the appearance of a Commonwealth's witness before a grand jury.

Reference is made to Section 19-247, providing for the summoning of out-of-State witnesses to attend and testify in grand jury investigations. Reference is also made to Section 19-248, Code of Virginia, as amended, providing that the Judge may, by order, direct the clerk of the court involved to issue such warrant, payable out of the State treasury, as may be necessary to make the tender of mileage and per diem to such out-of-State witnesses. The said statute further provides that the Attorney for the Commonwealth shall cause such tender to be made.
DEEDS OF TRUST—Taxation—Recordation of Deeds of Trust on Agricultural Chattel, Automobiles, to be in Miscellaneous Lien Book—State Tax on Full Amount Secured. (330)

May 2, 1960

HONORABLE J. ROBERT SWITZER
Clerk of Circuit Court of Rockingham County

This is in reply to your letter of April 29, which reads as follows:

"Please advise me where I shall record a deed of trust given on livestock, poultry, farm machinery and including also household property and an automobile. See Section 43-44 of the Code; also Sec. 17-61. In other words, if there is personal property other than that which pertains to farms included in the deed of trust, is the instrument recorded in Miscellaneous Lien Book—after June 27 or July 1 in the Deed Book? The Miscellaneous Lien Book was done away with by the 1960 legislature.

"I presume that if the same is to be recorded in the Miscellaneous Lien Book (or Deed Book after July 1) the state tax would have to be charged on the whole amount secured (if the instrument includes both farm machinery, etc., and other personal property.)"

Section 17-61 of the Code of Virginia is as follows:

"All deeds, mortgages, deeds of trust, homestead deeds and leases of personal property, bills of sale, and all other contracts or liens as to personal property not mentioned in §§ 43-27 and 55-88 to 55-90, which are by law required or permitted to be recorded, all mechanics' liens, all other liens not directed to be recorded elsewhere and all other writings relating to or affecting personal property which are authorized to be recorded shall, unless otherwise provided, be recorded in a book to be known as miscellaneous liens; provided, if a deed, deed of trust, mortgage, contract or other writing conveys, relates to or affects, both real and personal property, it shall be recorded in the deed book only, but shall be indexed in the general index book and the book of miscellaneous liens."

In my opinion the type of instrument described by you should be recorded in the Miscellaneous Lien Book. The recordation tax would be fifteen cents upon every hundred dollars or portion thereof of the amount secured by the instrument being recorded.

DENTISTS—Licensee Committed to and Released from Mental Institution—May Resume Practice Where Release Unconditional and License Not Revoked. (115)

October 12, 1959

HONORABLE JOHN M. HUGHES
Secretary, Virginia State Board of Dental Examiners

This is in reply to your letter of October 5, 1959, in which you enclosed Dr. Moffett H. Bowman’s letter of October 1, 1959, and requested my opinion on the matter presented. Dr. Bowman stated, in part:

"It seems that Dr. ........................., who was a veteran and a
graduate of about 195..., had a mental breakdown. He was given a
sanity hearing and committed to the Veterans' Hospital here in Roanoke
for treatment. He was later dismissed and (so I was informed) advised
to refrain from ever entering dental practice again. He went to live
with his father on a farm near ...................... Everything seemed
well taken care of until Dr. ..................... of ..................
heard of the man's plight and has instituted an investigation as to the
possibility of getting this man back in practice.

"I called the Veterans' Hospital and they would give me Dr.
......................'s medical history only on Dr. .....................'s
consent. I wanted to confirm the information referred to above.

"What is the position of a licensee who has been committed to a
mental institution?"

As you state in your covering letter, there appears to be nothing in Title 54,
Chapter 8, of the Code of Virginia, which covers this case. A study of the other
provisions of the Code which might be applicable does not reveal any statute law
pertinent to Dr. Moffett's inquiry.

It is my opinion that if the dentist in question has been discharged uncondi-
tionally from the mental institution to which he had been committed, he is
entitled to resume the active practice of dentistry, having been issued a certificate
and a license to practice, which certificate and license have not been revoked or
suspended pursuant to §§ 54-187 and 54-188 of the Code. The fact that the
Veterans' Hospital "advised" him to refrain from ever entering dental practice
does not alter the foregoing statement.

DIVORCE—Remarriage After—Four Month Prohibition Repealed—Effect on
Litigation Pending on Effective Date. (358)

Honorable C. Harrison Mann, Jr.
Member of the House of Delegates

This is in reply to your letter of May 17, 1960, which reads as follows:

"The General Assembly amended Title 20, Sec. 118 to eliminate the
4-month waiting period in divorce cases and to make legal certain
marriages which had been consummated in violation of the previous
4-month waiting period. The Act was amended to provide—'and pro-
viding further, that no litigation pending on the effective date hereof
shall be affected hereby.' This amendment was inserted to take care of
pending litigation involving an annulment case, the basis for which is
that the parties were married within the prohibited period of 4 months.

"The question has now been raised as to whether this proviso is
applicable either where a divorce case is pending, or in cases where
an a mensa decree has been entered but the final decree has not.

"A ruling on this question by your office will be appreciated."

The amendment to which you refer is as follows:

"Sec. 20-118.—On the dissolution of the bond of matrimony for any
cause arising subsequent to the date of the marriage, if objections or
exceptions are noted or filed to the final decree and a bond is given
staying the execution thereof, the court shall decree that neither party
shall remarry pending the perfecting of an appeal from said final judg-
ment of the trial court.
"Marriages heretofore celebrated in violation of any prohibition against remarriage shall not hereafter be deemed to be invalid because of the violation of such prohibition, provided that the parties to such a marriage have continued to reside together as husband and wife until the first day of July, 1960, or until such time as one of the parties dies prior to July one, nineteen hundred sixty; and provided further, that no litigation pending on the effective date hereof shall be affected hereby." (Proviso in question italicized).

Laying aside your question for the time being, I am of the opinion that the General Assembly, in the first paragraph of this amendment, abolished, as of June 27, 1960, the prohibition against remarriage within a four-month period, except in cases of an appeal.

In the second paragraph of the above amendment, it seems to me that the General Assembly intended, as of June 27, 1960, to validate all marriages heretofore deemed invalid because celebrated within a four-month period after the final decree, provided that (1) the parties to such a marriage have continued to reside together as man and wife until July 1, 1960, or until such time as one of the parties dies prior to this date, and (2) there is no proceeding pending on June 27, 1960, to annul or involving in any way whatsoever such a prohibited marriage.

In answer to your specific inquiry, I am of the opinion that the proviso in question refers only to a proceeding pending as of June 27, 1960, the purpose of which is to annul, or concerns in any way whatsoever, a marriage celebrated within the prohibited four month period and has no reference to pending divorce cases in which there has been no final adjudication of the factual or legal issues involved or to cases where a bed and board decree has been entered but the final decree has not. This is because the proviso in question is inserted in the second paragraph of the amendment and relates only to the contents therein, viz., "marriages heretofore celebrated in violation of any prohibition against remarriage."

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**DOG LAWS—Counties—County Dog Wardens—Disposition of Special Fund.**

(103) September 25, 1959

**HONORABLE MARTIN F. CLARK**

Commonwealth's Attorney for Patrick County

This is in reply to your letter of September 22, 1959, which reads as follows:

"There has been considerable confusion in my mind concerning the new Sections of the 1958 Code, Sec. 29-184.2 when read in conjunction with Sec. 29-206 and Sec. 29-209 of the Code.

"As I am aware, Sec. 29-184.2 provides in Sec. (C) that in the event that the County decides to use a dog warden that 'The funds collected for dog license taxes shall be paid into a special fund and may be disposed of as provided in this section and in Secs. 29-206 and 29-209, whereby that the County Treasurer shall not be required to remit any portion of such funds to the State Treasurer, nor shall the governing body be required to supplement the salary of the game warden. Sec. (C) further provides that the County shall pay the salaries and expenses of the dog warden and special dog wardens from such special fund. Any sum remaining shall be left to accumulate in said fund for a period of not less than three years and not more than 50% of such accumulated
fund shall be transferred from said special fund to any other fund, except as herein provided in any one fiscal year.'

"In reading Sec. 29-209, entitled 'Disposition of Dog Funds', which is embodied in this section, or Sec. 29-184.2 that any funds in excess of $250.00 remaining in the hands of the Treasurer on December 31st may on that date be transferred into the General Fund of the said County or City or at the discretion of the governing body, may be transferred into a special fund and used for the purpose of replenishing or restocking quail and so forth.

"My question is this: Can the Board of Supervisors, under the terms of Sec. (C), follow Sec. 29-209 which is made a part of Sec. (C) and transfer all funds except the $250.00 each year, keeping in mind that the last sentence says that funds shall be left to accumulate for a period of three years except as herein provided.

"Does Sec. 29-209 come within the provisions which are embodied in Sec. (C) which states that it may not be used except as herein provided?

"I will admit that this section is quite confusing to me, but it seems to me that under the express terms of Sec. (C), that the Board of Supervisors can transfer these funds for the purposes stated in Sec. 29-209, leaving a balance of $250.00 each year."

Paragraph (c) of Section 29-184.2 of the Code reads as follows:

"In such county the amount of the dog license tax, which in no event shall be more than five dollars per dog, shall be fixed by ordinance adopted by the governing body of such county, and thereafter the tax imposed under § 29-184 shall not apply therein. The funds collected for dog license taxes shall be paid into a special fund and may be disposed of as provided in this section and in §§ 29-206 and 29-209, except that the county treasurer shall not be required to remit any portion of such funds to the State Treasurer nor shall the governing body be required to supplement the salary of the game warden. The county shall pay the salaries and expenses of the dog warden and deputy dog wardens from such special fund. Any sum remaining shall be left to accumulate in said fund for a period of not less than three years, and not more than fifty per cent of such accumulated fund shall be transferred from said special fund to any other fund, except as herein provided, in any one fiscal year."

As I interpret this section, at the time funds for dog license taxes are collected by the treasurer, such funds shall be deposited into a special fund. Out of this special fund the treasurer shall pay the salary and expenses of the dog warden and deputy dog wardens. Also out of this special fund there shall be paid the warrants authorized by the board of supervisors for the items mentioned in the first paragraph of Section 29-209.

Paragraph (c) of Section 29-184.2, it will be noted, provides that the taxes paid into the special fund "may be disposed of as provided in this section and in sections 29-206 and 29-209 * * *." The reference to Section 29-206 may be ignored because of the fact that under Section 29-206 the only payments authorized are payments of the 15% to the State treasury, which are expressly excepted. After the payment of the items specified in the preceding paragraph, any sum remaining from the taxes collected from the sale of tags for any fiscal (tax) year shall be left to accumulate in the said special fund for a period of not less than three years. Whenever any funds have accumulated in the special fund for as long as three years, then the board of supervisors may direct the treasurer to transfer to any other fund out of such accumulated fund not more than 50% of such accumulation in any one fiscal (tax) year. The balance then remaining in the special fund
will be not less than one-half of the accumulated fund, plus the unexpended collections that are not three years old.

The provision in Section 29-209 to the effect that any funds in excess of $250.00 remaining in the hands of the treasurer on December 31st may be transferred into the general fund of the county or, in the discretion of its governing body, may be transferred into a special fund, in my opinion, is not applicable to a county that has adopted a dog law under Section 29-184.2 of the Code.

The provisions with respect to "any funds in excess of two hundred and fifty dollars * * *"—the fourth paragraph of Section 29-209 relating to the disposition of the excess funds under this section—in my judgment, have been superseded by the terminal sentence of paragraph (c) of Section 29-184.2. The excess sum in those counties adopting a local dog law is not determined and handled in the same manner as excess funds in those counties that continue to operate under Section 29-209.

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DOG LAWS—County Dog Wardens—Office May Be Abolished—Compensation May Be Reduced. (224)

HONORABLE R. D. COLEMAN
Commonwealth's Attorney for Scott County

February 1, 1960

This is in reply to your letter of January 13, 1960, asking for the opinion of this office on two questions. I regret that the press of duties engendered by the convening of the General Assembly has prevented my replying until this time.

Your letter states:

"At a regular meeting of the Board of Supervisors of Scott County, Virginia, held on November 5, 1959, the board by resolution adopted, recommended to the Judge of the Circuit Court of Scott County that a dog warden be appointed for Scott County pursuant to Section 29-184.2 as amended of the Code of Virginia. The board also fixed the salary of the dog warden at $300.00 per month plus mileage of 7¢ per mile; the appointment to become effective as of December 1, 1959 and to end on June 30, 1960; and recommended the appointment of Robert L. Smallwood as dog warden.

"The Judge of the Circuit Court of Scott County by order entered November 23, 1959, appointed Robert L. Smallwood as dog warden for Scott County to serve from December 1, 1959 until June 30, 1960, and to receive such compensation as has heretofore been prescribed by the Board of Supervisors.

An entirely new Board of Supervisors took office on January 1, 1960 and I would thank you to give me your opinion on the following questions:

"1. May the Board of Supervisors now rescind or repeal the resolution, so that Section 29-184.2 of the Code of Virginia would be no longer effective in Scott County?

"2. May the Board of Supervisors now reduce the compensation and mileage of the dog warden?"

In response to your first question, please be advised that the Board of Supervisors may now abolish the position of county dog warden and cease to impose a county dog license tax by enacting appropriate ordinances. I am enclosing a copy of an opinion rendered to Honorable A. A. Rucker, Commonwealth's Attorney for Bedford County, dated October 30, 1958, to the same effect.
With regard to your second question, I am aware of no statutory prohibition against the County Board of Supervisors reducing the compensation and mileage paid to the county dog warden. Section 29-184.2, as amended, of the Code of Virginia, specifies in subsection (a):

"The dog warden and deputy dog wardens shall be paid such compensation as the governing body of the county may prescribe."

Although the resolution of the Board of November 5, 1959, asking that the Judge of the Circuit Court of Scott County appoint a dog warden, specified that such dog warden would receive a salary of $300.00 per month plus mileage at 7¢ per mile to a maximum of 2,000 miles per month, and the Court did so appoint a dog warden "to receive such compensation as has heretofore been prescribed by the Board of Supervisors of Scott County Virginia," it is my opinion that the action of the Board setting the compensation may be rescinded by appropriate resolution and future compensation set at a lower rate.

DOG LAWS—County Ordinances Imposing License Tax Must Prescribe Penalty for Violation—Penalty May be Paid into County Treasury. (383)

June 10, 1960

HONORABLE GEORGE P. SMITH, JR.
Commonwealth's Attorney for Fluvanna County

This is in reply to your letter of June 1, in which you state, in part, as follows:

"Pursuant to the provisions of Section 29-184.2 of the Code of Virginia of 1950, as amended, the County of Fluvanna has passed an ordinance vesting the enforcement of the dog laws in a dog warden. It has also, by ordinance, fixed the amount of the dog license tax in the County of Fluvanna, and provided penalties for violation of the ordinance.

"The question has arisen as to whether fines imposed for violation of the dog license tax ordinance should be paid by the County Judge to the County or to the State. Such violations are charged on county warrants as a violation of the county ordinance.

"It has been my position and the position of the County Judge that fines collected for violations of the county ordinance should be paid to the County, since Section 29-184.2 provides that when the County has fixed the amount of the dog license tax by ordinance, the tax imposed under Section 29-184 does not apply. Therefore, when a person fails to buy the required dog license it is no violation of a State law, but only of the county ordinance. Section 29-184.2 specifically provides that the funds collected for the dog license taxes shall be paid into a special County fund, but I cannot find where there is any specific provision for the disposition of fines for violation of such ordinance."

You further state that the State Auditor has raised some question as to the payment of these fines to the localities.

Your letter of June 1 has been supplemented by a letter dated June 3, 1960, in response to my inquiry as to whether or not the county has adopted an ordinance under the provisions of Section 29-184.4 of the Code. Your second letter is as follows:

"In reply to your question, I find that under the provisions of Section 29-184.4 of the Code, the Board of Supervisors enacted an ordi-
In my opinion the ordinance that has been adopted by the board of supervisors is not sufficient because of the fact that it fails to provide the penalties for violation of the ordinance. I do not feel that the portion of the ordinance which you have quoted making reference to the general law is sufficient. In my opinion, before the county can enforce an ordinance for violating the dog license laws, it will be necessary for the ordinance to be amended so as to specifically make provision for penalties for violation within the limits set forth in Section 29-184.4 of the Code.

Prior to the enactment of Section 29-184.4 at the Special Session of the General Assembly of 1959, this office had ruled that all fines collected for the violation of dog license laws were payable into the State treasury and not into the local treasury. This new section makes it possible for a locality to adopt an ordinance and impose fines and pay the proceeds of the fines into the local treasury. In order, however, for it to be a valid and enforceable ordinance, I think it is essential for the ordinance to specifically prescribe the penalty for violation.

However, if any warrants have been issued for violation of the county ordinance, and the defendant has not raised the question of its validity and a fine has been imposed and collected from such defendant, in my opinion, the fine would go into the local treasury.

As I have indicated, I suggest that the county ordinance be amended so as to remove the doubt that now exists as to its validity.

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DOG LAWS—Killing of Poultry by Dog—Compensation of Owner by County—County Subrogated to Rights of. (195) December 30, 1959

HONORABLE WILLIAM P. PARKERSON, JR.
Commonwealth's Attorney for Henrico County

This is in reply to your letter of December 29, 1959, relating to a claim filed by a citizen whose poultry was killed by a dog belonging to another person. The claim is filed under § 29-202 of the Code of 1950, as amended. The facts are stated as follows:

"A dog gained entrance to an enclosure containing poultry and killed all of the poultry present. The owner of the poultry opened the enclosure so that the dog could be released. This act was not done to protect any remaining poultry and but for this action on the part of the owner, the dog could not have escaped from the enclosure."

You further state that the county dog warden has been unable to locate or identify the dog or its owner.

A question as to the liability of the County under § 29-202 to pay the claim is suggested by the following language contained in your letter:
In examining the statute, I find no requirement that the owner must be free from negligence to be entitled to the payment of a claim, or that he is under any positive duties or that any positive acts upon the owner's part will bar his recovery.

Inasmuch, however, as this statute provides that the county shall be subrogated to the extent of the compensation paid to the right of action to the owner of such poultry against the owner of the dog, it appears that the owner has by his own actions effectively precluded the county from instituting an action against the owner of the dog.

"I am wondering, therefore, whether or not the action of the owner of the poultry, as set forth above, should bar payment by the county of this claim."

In my opinion, the entitlement to compensation by the owner of the poultry from the county dog fund is not dependent upon the identity of the dog and its owner. The statute authorizes the person who was damaged by the dog to bring an action against its owner for the damages suffered, but the person who has suffered loss on account of the dog is under no requirement, as a condition precedent to his entitlement to compensation, to identify the dog and bring such suit against the owner. I do not construe the statute to mean that the county may sue the owner of the dog; the right of action for damages is specifically vested in the person who suffered the loss, and the county is given the right to enforce its subrogation rights in an appropriate action at law against the person who has been paid a claim by the county and subsequently recovers damages from the owner of the dog.

The terminal paragraph of this Code Section requires the claimant in such cases to exhaust his legal remedies against the owner of the dog, but this provision is not applicable to Henrico County.

ELECTIONS—Absentee Ballots—Voter Deceased Prior to Election Day. (139)

HONORABLE CHARLES J. ROSS
Clerk of Circuit Court of Madison County

October 26, 1959

This will acknowledge receipt of your letter of October 28, 1959, which reads as follows:

"The secretary of the Madison County Electoral Board has in his possession an absentee ballot for delivery to the proper election officials on election day Nov. 3, 1959.

"The person who cast this absentee ballot is now deceased.

"Will you advise what disposition should be made of this absentee ballot by the secretary of the electoral board?"

In my opinion, the secretary of the electoral board should treat this ballot in the same manner as all other mail ballots except that he should attach a notation to the envelope in which the ballot was returned to the effect that he is advised that the voter of that ballot has died. The judges of election, if they are satisfied as to the conclusiveness of the evidence before them to the effect that the voter is deceased, should not open the envelop in which the ballot is contained, but should return the envelope and ballot to the clerk along with their statement as to why the ballot was not counted.

Although the voter has marked his ballot, in my opinion, it is not deemed to be
actually cast until the day of election. It is obvious that a person who has died cannot vote on election day and the absentee ballot of any such person should not be counted.

ELECTIONS—Absentee Voting—Method—Challenges (148)

Mr. Joseph B. Clower
Registrar, Court House Precinct, Shenandoah County

This is in reply to your letter of November 7, 1959, which reads as follows:

"I have been Registrar of voters for Court House Precinct in Shenandoah County for many years.

"A controversy arises frequently, at election times, regarding Absentee voting privilege.

"Sec. 24-321 says application for ballot must be made not less than eight days before election day.

"It has occurred on a number of occasions, that a voter finds, within a few days before election, that he will not be able to be at the polls, and he makes application for an absentee ballot and after having it certified by the registrar takes it personally to the electoral board, receives the ballot and votes it in the presence of the Secretary of the electoral board.

"Should this voter be deprived of a vote because less than eight days have expired?

"It has always seemed to me, that every person if qualified, has a right to vote as long as his application has gone through the proper channels regardless of days expired.

"Do I violate the law by certifying that the person is properly registered even though 8 days have expired?

"Should such a voter’s ballot be challenged because more than 8 days expired before he had completed his ballot?"

Section 24-321 of the Code, reads as follows:

"He shall make application in writing for a ballot to the registrar of his precinct, not less than eight nor more than sixty days prior to the primary or general election in which he desires to vote if he be within the confines of the United States. Such application shall be made not less than ten days nor more than ninety days, if he be in Hawaii, Puerto Rico, the Canal Zone, or in territory over which the United States has no jurisdiction.

"In case of any second primary or special election such application shall be made not less than three days nor more than thirty-five days prior to such second primary."

Under this section no person is entitled to an absentee ballot either by mail or by delivery in person unless the application is filed not less than eight days nor more than sixty days prior to the primary or general election in which he offers to vote. This statement, of course, is subject to the exceptions with respect to persons who are outside of the United States and to any second primary or special election, but the time limitations contained in these exceptions cannot be ignored.

With respect to the specific questions presented by you, any absentee vote
cast by a person whose application was not filed within the time prescribed by the statute is an illegal vote and the judges of election should refuse to deposit the vote in the ballot box. However, any such person who has voted in such manner may appear personally at the polls on election day and cast his ballot in person pursuant to the provisions of Section 24-340.1 of the Code.

A registrar should refuse to furnish an applicant for an absentee ballot with a certificate to the effect that he is a registered voter in his precinct unless the application for such certificate is made within the time prescribed by Section 24-321. The electoral board does not have authority to furnish a mail ballot to any person unless the application has been filed within the statutory time. The statute prescribes the time limit within which an application may be filed and any election official who participates in the filing of such application and the furnishing of a ballot thereunder would, in my opinion, be acting in violation of the election law.

Your last question reads as follows:

"Should such a voter's ballot be challenged because more than 8 days expired before he had completed his ballot?"

It is not necessary for a voter to complete the ballot within an eight-day period, but it may be voted any time after the ballot has been received, provided it is voted and returned to the electoral board in ample time for the electoral board to transmit the ballot to the proper precinct on election day.

ELECTIONS—Absent Voters—How Voucher and Coupon Executed. (131)

October 20, 1959

HONORABLE HARRY P. ROWLETT
Commonwealth's Attorney for Lee County

This is in reply to your letter of October 15, 1959, which reads as follows:

"I would appreciate your opinion on the following questions pertaining to Sections 24-333 and 334, Code of Virginia.

"(1) Must the coupon mentioned in Section 24-333 be filled out in the voter's own handwriting?

"(2) Does Section 24-334 require that the voter fill in the voucher in his own handwriting?"

In my opinion both questions presented by you must be answered in the negative. The voucher and coupon may, in my opinion, be filled in by typewriter or in the handwriting of a person other than the voter. The voter, of course, is required to sign the voucher, thus certifying to the accuracy of the information shown thereon.

The coupon is a certificate executed by the notary or other officer who acts in the capacity prescribed in Section 24-334, and the voter has no responsibility in connection with the preparation of this document.

ELECTIONS—Ballots—How Names May Be Written in—Misspelling of Name. (114)

October 9, 1959

HONORABLE B. W. SEAY
Judge, County Court of Fluvanna County

This is in reply to your letter of October 8, 1959, which reads as follows:
"I have been asked a question with reference to write-in voting regulations that I do not find a definite answer to in the statutes, and I am wondering if you will be kind enough to give me an opinion on same.

"I have before me an opinion of the Attorney General in volume 1955-1956 at page 55, which explains what should be done with respect to the given name or names of a write-in subject. My question has to do with the possible mis-spelling of the surname of a write-in subject.

"Suppose, for instance, that a number of voters would want to write in the name of a Mr. Schmidt; some would spell his name correctly, while others might spell it Smit or Smitt. Should that be done, what would be the duty of the judges when counting the ballots spelled incorrectly?"

Under Section 24-252 of the Virginia Code, a voter may insert in his own hand writing on an official ballot the name of a person he desires to vote for and may vote for such person by marking the same in one of the methods set forth in said section. I am enclosing copy of this Code section which shows three different marks that may be used in voting for the person whose name has been inserted by the voter.

In my opinion, it is not necessary for the voter to accurately spell the name of the person for whom he is voting; it is sufficient if the name has been placed thereon in such manner that there can be no doubt in the minds of the judges of the election as to the identity of the person for whom the write-in vote is cast.

I enclose a copy of an opinion relating to an error in printing the name of a candidate. This opinion is published in the Report of the Attorney General for 1939-'40, at page 76. I note you have access to our opinion published in Report of the Attorney General for 1955-'56, at page 55.

ELECTIONS—Ballots—Names Written in by Voter Must Have Proper Mark Preceding. (86)
ELECTIONS—Candidates—Eligibility—Defeated in Primary and Elected by Write-In at General Election. (86)

September 14, 1959

HONORABLE T. W. DOWNING
Secretary, Warren County Electoral Board

This is in reply to your letter of September 10, 1959, which reads as follows:

"Referring to 'Virginia Election Laws' code number 24-252. Please advise if the judges of the election should count all ballots with insertion of names on ballots regardless if they are marked by a check or cross mark.

"If the candidate who was defeated in the democratic primary should be elected by an insertion of name on ballot, would he be eligible to take office."

Section 24-252 of the Code, to which you refer, reads as follows:

"It shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote and mark the same by a check or cross mark or a line immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."
Under this section, if a voter inserts the name of a person on the ballot and marks the same by a cross or a check or a line immediately preceding the name inserted, it is considered a valid vote and should be counted. If no such mark is placed in front of the name, then it may not be considered as a valid vote.

In answer to your second question, I am of the opinion that in such a case the person would be entitled to the office to which he was elected provided he is in all other respects eligible. The fact that he was the candidate in the primary and was defeated would not disqualify him from being elected by a write-in vote.

Elections—Ballots—Where Certified Party Candidate Withdraws—Separate Ballot May be Necessary. (61)

Honorable Levin Nock Davis
Secretary, State Board of Elections

August 19, 1959

This is in reply to your letter of August 19, 1959, to which you have attached a letter from Mr. A. D. Goodwin, Secretary of the Electoral Board of Roanoke County, who has presented to you the following question:

"I would like to have your opinion about leaving the office of Senate off the Ballot for Roanoke County, since Mr. Ted Dalton has withdrawn as the Republican Candidate, and the only other Candidate certified to me is Mr. John B. Spiers, Jr., an independent Candidate.

"I am sure there will be other Candidates for this office and there will have to be a separate Ballot for said office as provided under Sec. 24-234. Could I leave Mr. Spiers' name off the County Officers Ballot and have it printed on the separate Ballot for Senator, which will be printed as provided under Sec. 24-234 Virginia Election Laws?"

In my opinion it is the duty of the electoral boards of the counties and city composing the Twenty-first Senatorial District to print the name of Mr. Spiers upon the official ballots along with the names of the candidates for the county offices. Mr. Spiers has filed his notice of candidacy and accompanying petition within the time required by law. This entitles him to have his name printed upon the official ballots prepared pursuant to Article 4, Chapter 11, Title 24 of the Code.

In the event other candidates should file for the office of State Senate pursuant to the provisions of Section 24-234 of the Code, it is provided in this section as follows:

"* * * If the same is filed with the proper official at least twenty days before the day on which the election is to be held, the electoral board or boards having charge of the printing of the ballots for such election shall either:

"(1) Cause to be printed thereon the name of every person so qualifying as provided in this section, or

"(2) If ballots for the election have already been printed and contain the names of candidates for other offices to be voted on at such election, any such electoral board may in its discretion cause to be stricken therefrom the title of the office involved, and the names of all candidates for such office appearing thereon, and cause separate ballots to be printed for such office on which shall be printed the names of all candidates qualifying under the provisions of this section. * * * *"
It will be noted that under this section the names of any additional candidates for State Senate may be printed on the ballot which is prepared under Section 24-213. Under this section, the electoral boards are required to print these ballots at least thirty days prior to the election, or as soon thereafter as possible. I do not feel that the electoral boards should delay the preparation of the ballots until the time for filing for Senate under Section 24-234 has expired. The regular county ballots should be prepared and available for use under the absent voters statute at least thirty days prior to the election. If none of the ballots are printed until after the final filing date for State Senate, the ballots would not be available until after twenty days prior to the election.

I suggest that you notify the electoral boards of each county and city in the Twenty-first Senatorial District that they should delay the printing of any ballots until thirty days prior to the election, unless it is reasonably apparent before that time that all candidates for the Senate have filed. If other candidates should file between the time the ballots have been prepared and the dead-line under Section 24-234, I would suggest that the several boards strike the Senate portion from the ballots—the title of the office and the name of Mr. Spiers—and print an additional ballot for the office of state Senate. In that case each voter would be furnished two ballots when offering to vote.

I wish to call attention to Section 24-235 of the Code, which reads as follows:

"Whenever any additional candidate shall qualify pursuant to this section, no ballots theretofore cast by mail vote for a candidate for such office shall be counted, but any person who has so voted shall be entitled to receive a new ballot and to vote for his choice among all such candidates for such office."

Should two ballots be used in this election, the electoral boards would be required to send one of the Senate ballots to each person who has voted by mail, along with an explanation as to why the second ballot is being sent. Furthermore, the judges of election should be instructed to disregard that portion of the mail ballot which has already been voted with respect to the Senate race, but that the balance of the ballot for county offices and House of Delegates shall be tabulated by the judges of election.

ELECTIONS—Candidates—Defeated in Party Primary Not Eligible to Have Name Printed on Ballot in Succeeding General Election—Challenges of Voters. (36)

HONORABLE T. E. CAMPBELL
Clerk of Caroline County

July 29, 1959

This is in reply to your letter in which you state that certain citizens have filed as independent candidates for public office in your county for the general election to be held in November of this year. You further state that a primary was held for these offices, and that neither of the independent candidates were candidates for nomination for such offices in the recent primary. Both of these candidates, it is stated, voted in the primary election. One of these candidates has filed for the office of sheriff. It is stated that a public announcement appeared in a local paper stating that this person would be the chief deputy of one of the candidates for sheriff in the primary, if he should be nominated. The defeated candidate for sheriff has signed the petition in behalf of this candidate, who was to have been chief deputy.

The petition of the other candidate, who has filed for the office of supervisor, is signed by the defeated candidate for nomination for that office.
You present the following questions:

1. Can the County Democrat Committee enjoin the County Electoral Board from printing the names of Durrett and Megeath on the ticket to be used in the General Election of Nov. 3, 1959?

2. What is the legal and moral position of Durrett and Megeath after voting in the primary, supporting the losing candidates at the polls, and running as independent candidates in the general election?

3. Can any legal action be taken against Moore and Swisher, the defeated candidates in the primary, for signing the loyalty oaths to the Democrat party and its nominees, and subsequently signing petitions urging Durrett and Megeath to run as independent candidates in the general election?

4. What is the position of the voters, who after participating in the primary, signed the petitions, which permitted Durrett and Megeath to qualify as independent candidates in the general election? What are their moral and legal positions? Can they be barred from future primaries unless they pledge to support the Democrat nominees in the November 3, 1959 election?

I shall answer the foregoing questions in the order stated:

1. A candidate for nomination to an office in a primary is required to comply with Section 24-371 of the Code in order to be entitled to have his name certified to the electoral board. This section is as follows:

   "The declaration required by the preceding section shall be in substantially the following form: 'I .................................. of the county (or town or city of) .................................. a member of the ................... party, declare myself to be a candidate for nomination to the office of .......................... If I am defeated in the primary I hereby direct and irrevocably authorize the election officials charged with the duty of preparing the ballots to be used in the succeeding general election not to print my name on said ballots.'"

Under this section, a candidate in a primary election, if defeated, is not eligible to have his name printed on the ballot in the succeeding general election.

There is no statute of this nature applicable to a person who has participated in a primary and later files as a candidate for the succeeding general election in opposition to one of the nominees named in the primary. Therefore, in my opinion, such person's eligibility as a candidate may not be successfully challenged solely on the ground that he participated in the primary at which his political party nominated its candidates.

2. I have answered this question as to the legal position in my reply to question 1. I shall refrain from discussing the moral position, since that is not a proper function of this office.

3. I do not know of any legal action that may be taken.

4. The qualifications and disqualifications for voting in a general election are set forth in Section 21 of the Constitution and Chapter 2 of Title 24 of the Code of Virginia. Under these provisions, the persons who participated in the primary and later signed the petitions in question may not, for that reason only, be denied the right to vote in the general election.

With respect to the moral positions of these persons, I again feel that I must decline to express an opinion for the reason set forth in my answer to question 2.

In question (4) you ask:
Can they be barred from future primaries unless they pledge to support the Democrat nominees in the November 3, 1959 election?

The qualifications for voting in a primary are contained in Section 24-367 of the Code. Section 24-368 provides the method for challenging the right of a person to vote in a primary. These sections provide that a person, in order to be entitled to vote in a primary, must, if challenged, declare on oath that he or she is a member of such party and supported the nominees of the party in the last preceding general election.

ELECTIONS—Candidates—Must be Resident Elector of District in Order to Hold Office. (71)

Honorable Levin Nock Davis
Secretary, State Board of Elections

This is in reply to your letter of August 24, 1959, which reads as follows:

"The enclosed letter has been received from the Secretary of Wythe County Electoral Board concerning Mr. Temple P. Mabe, who was certified as a candidate for the Justice of the Peace for Fort Chiswell District of Wythe County and who, it appears, is duly registered and votes in said Fort Chiswell District. However, he was also certified as T. P. Mabe as a candidate for the Justice of the Peace in the Wytheville District, and according to the information received from the Secretary of Wythe County Electoral Board he has lived in Wytheville approximately four years and pays taxes in the town of Wytheville, where he is assessed for capitation and personal property taxes. According to a statement from the local electoral board, Mr. Mabe, the candidate, only desires to run in the Fort Chiswell District, and from the information that has come to me this is the district in which he is duly registered and votes.

"I feel that he is entitled to go on the ballot in the district where he is duly registered, but Section 15-487 of the Code says every district officer shall, at the time of his election or appointment have resided in the district for which he is elected or appointed thirty days next preceding his election or appointment. I would like to have your opinion in the matter before advising the secretary of the electoral board, as it appears to me from the information received over the telephone and by letter that there is a desire to place him on the official ballot in two districts for the general election to be held on November 3, 1959."

I enclose three opinions pertaining to the question presented. These opinions are dated January 31, 1956, June 22, 1959 and August 5, 1959, and were furnished to Honorable Harry P. Rowlett, Honorable Kenneth M. Covington and Honorable Frank Nat Watkins, who are Commonwealth's Attorneys for Lee County, the city of Martinsville and Prince Edward County respectively. These opinions state the general principles involved in such cases.

Under these opinions and the cases cited, there is grave doubt as to Mr. Mabe's entitlement to run for office in the Fort Chiswell District. While Mr. Mabe is an elector within the Fort Chiswell District, I do not feel that he has the status of a resident elector. The information furnished by the Secretary of the Electoral Board does not indicate that Mr. Mabe maintains two places of abode as was the case in the opinions which are enclosed. Frequently persons move from one community to another and retain their voting place at the precinct from which they have moved, and this they may do if they have the intention of ultimately...
returning, but for the purpose of holding office under Section 32 of the Constitution and Section 15-487 of the Code, such persons fail to qualify because they actually reside outside the jurisdiction in which they vote. We have held that the Constitution and Section 15-487 of the Code contemplate one's physical place of abode as well as his domicile for the purpose of voting.

If it is Mr. Mabe's desire to run for office in the Wytheville District, he may do so, in my opinion, provided he transfers his registration for voting purposes from the precinct where he is now registered to the precinct in Wytheville where he now resides. By this method he will demonstrate that he has abandoned Fort Chiswell as his voting residence. He cannot, under the provisions of Section 32 of the Constitution and the statutes, hold a magisterial office in a District in which he is not qualified to vote.

I am of the opinion that the Electoral Board has no authority to place Mr. Mabe's name upon the official ballot in more than one Magisterial District. I suggest that you advise the Electoral Board that if Mr. Mabe does not transfer his vote from the District in which he is now registered, to the Wytheville District, that it has no authority under the law to place his name on the ballot for the Wytheville District. If he transfers his vote to the Wytheville District prior to the printing of the ballots, then the Board would have authority to print his name on the ballot in that District, in which case his name may not be placed on the ballot in the Fort Chiswell District.

If Mr. Mabe does not transfer his vote to the Wytheville District, but insists that his name should be printed on the ballot in the Fort Chiswell District, then the Board should, I believe, place his name on the ballot in that District since he is a qualified voter there, and I doubt if it is the function of the Electoral Board to pass upon the question of his entitlement to hold the office should he be elected. That question is one for a court of competent jurisdiction to determine.

I wish to emphasize my statement that the Board has no power to print this candidate's name on the ballot in both Districts.

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ELECTIONS—Candidates—Poll Tax—Eligibility for Town Council—Failure to Pay Poll Tax on Time Prevents Printing Name on Ballot, but May Qualify for Office if Elected and is Qualified to Vote at Time of Taking Oath as Town Officer. (323)

April 28, 1960

HONORABLE WILLARD R. FINNEY
Secretary, Franklin County Electoral Board

This is in reply to your letter of April 22, in which you state that one of the candidates for member of the council of Rocky Mount failed to pay her poll tax for the year 1959 until April 1, 1960. You request my advice as to whether or not this person would be eligible to be a candidate for the office of town councilman.

§ 24-132 of the Code is as follows:

“No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for the election, unless he be a party primary nominee.”

Due to the provisions of § 24-131, which embraces all officers not embraced in § 24-130 of the Code, the provisions of § 24-132 have been construed to apply to candidates for town offices. The person in question will not be qualified to vote in the June election because she failed to pay her poll tax for each of the three preceding years six months prior to the date fixed for the June election in 1960.
§ 24-132 of the Code does not specifically provide that such a person may not be a candidate but it does expressly state that no person shall be entitled to have his name printed on an official ballot unless such person is qualified to vote in the election in which he offers to be a candidate.

Under § 32 of the Constitution, every person qualified to vote shall be eligible for any office of the State or of any county, city or town.

Therefore, any person who has been elected to the office of town council will be entitled to take the oath of office and qualify for the office to which such person has been elected if he is qualified to vote at the time he is sworn in as a town officer.

Elections—Candidates—Qualification—When Necessary to be Registered Voter and Pay Poll Tax to have Name on Ballot. (369)

June 1, 1960

HONORABLE W. M. E. SANDIDGE
Clerk of Circuit Court of Amherst County

This is in reply to your letter of May 27, in which you present the following questions:

"(1) Must a candidate for either office [mayor or councilman] be a registered voter?

"(2) Must a candidate for either office have paid three (3) years State poll tax? If so, what would be the last possible date on which this might be paid to qualify?

"(3) Must all persons offering to vote at the above mentioned election meet the requirements of questions 1 and 2?"

With respect to question number 1, you are referred to Section 24-168 of the Code, in which it is provided as follows:

"In every town there shall be elected every two years, on the second Tuesday in June, one elector of the town, who shall be denominated the mayor, and not less than three nor more than nine other electors, who shall be denominated the councilmen of the town. The mayor and councilmen shall constitute the council of the town;"

An elector, as used in this section, is a person who is qualified to vote in the election in which he offers as a candidate. Under Section 24-132 no person who is not qualified to vote in the election in which he offers as a candidate shall be entitled to have his name printed on the official ballot, unless such person be a party primary nominee.

The Code sections cited have not been interpreted to prevent a person who is not an elector from being elected to public office by a write-in vote. If a person is elected by write-in vote, even though he was disqualified under these sections from having his name printed on the official ballot, he may, nevertheless qualify for the office to which he has been elected if at the time he assumes the office he is a qualified voter. See Section 32 of the Constitution.

Whether or not a candidate in order to qualify to have his name placed on the official ballot would have to have paid three years State poll tax would depend upon whether or not such person was assessable for poll taxes in each of the three preceding calendar years. The last day for payment of poll tax of persons who were assessable for the year 1959 and preceding years in order to vote in the June election was December 14, 1959.

With respect to your question number 3, persons offering to vote in the town
election must be registered and have paid their poll taxes six months previous to
the election unless they are exempt from the payment of such taxes for some
reason, such as having become twenty-one years of age subsequent to January 1,
1959, or subsequent to January 1, 1960, depending upon when the person offered
to register. I enclose two opinions relating to the registration of voters on becom-
ing twenty-one years of age. These opinions are published in the Reports of At-

ELECTIONS—Candidates—Qualification—Where Name on Primary Ballot
by Mistake and Elected Party Nominee. (42)

Mr. Levin Nock Davis
Secretary, State Board of Elections

This is in reply to your letter of July 28, 1959, which reads, in part, as follows:

"The enclosed letter dated July 23, 1959, has been received from Mr. Lewis H. Vaden, Vice-Chairman of the Democratic Committee of Chesterfield County.

"It appears from his letter that Mr. James D. Shelton qualified on or before April 15, 1959, as a candidate in the Democratic Primary for office of Justice of the Peace for the Magisterial District of Bermuda in Chesterfield County, and that the official number of Justices of the Peace allowed Bermuda Magisterial District is four. It appears further, according to his statement, that there were five persons qualified as candidates on or before April 15, 1959, to run as Justices of the Peace in said Magisterial District, and that all five names were printed on the official primary ballot. On July 14, 1959, the day of the Democratic primary, it was discovered by the judges of the polls at Chester precinct that the candidate in question, James D. Shelton, was not a qualified voter due to the fact that he had not paid his State capitation tax for the calendar year of 1956. On Thursday, July 16, 1959, when the election commissioners met for the purpose of canvassing the ballots it was ascertained by said commissioners that James D. Shelton had received the greatest number of votes cast in the Bermuda Magisterial District for Justice of the Peace. The Vice-Chairman now requests an opinion as to whether or not this person's name should be placed on the official ballot for the general election to be held in November as a Democratic nominee."

The answer to your question depends upon the meaning of Section 24-132 of the Code of Virginia. This section is in the following words:

"No person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for the election, unless he be a party primary nominee."

In my opinion, the phrase "unless he be a party primary nominee" modifies the preceding part of the section. The meaning of the statute is clear when recon-
structed as follows:
REPORT OF THE ATTORNEY GENERAL

"Unless he be a party primary nominee, no person not announcing his candidacy as above, or who is not qualified to vote in the election in which he offers as a candidate, shall have his name printed on the ballots provided for the election."

Section 32 of the Constitution of Virginia provides as follows:

"Every person qualified to vote shall be eligible to any office of the State, or in any county, city, town or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; and except, further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions or posts requiring special technical or professional training and experience. "Persons eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity."

This section of the Constitution, in my opinion, does not require a person to be qualified to vote in order to be elected to any of the offices set forth therein. This office has ruled that persons who have been elected to public office by a write-in vote, but were not qualified to vote on the day of the election due to the non-payment of the necessary poll taxes, could qualify and hold the office to which they had been elected, provided they were qualified voters at the time of induction into the office.

Under Section 24-369 of the Code Mr. Shelton was not entitled to have his name printed on the official primary ballot. However, it appears that through an oversight the chairman of his party with whom he filed his declaration of candidacy and petition certified his name as a candidate to the Electoral Board and to the State Board of Elections. The ballots were duly printed containing Mr. Shelton's name as a candidate for nomination for the office involved. The electors in his district who are members of his party have voted and have chosen Mr. Shelton as a candidate. This is attested by the tabulation of the votes by the judges of election and by the official canvass made by the commissioners of election who were appointed under Section 24-383 of the Code.

The action by the Electoral Board in causing Mr. Shelton's name to be printed on the official primary ballot was not questioned in any court of competent jurisdiction. The action by the commissioners of election in ascertaining from the returns the candidates who have received the greatest number of votes for nomination for this office has likewise not been questioned in a court of competent jurisdiction, and the time in which such a challenge of his nomination in this primary could be commenced has expired.

Although Mr. Shelton was not entitled to have his name printed on the official primary ballot, it nevertheless did appear thereon and he was selected by affirmative action of the democratic voters participating in the primary election as one of the nominees of the Democratic Party for justice of the peace in his magisterial district. It will be observed that Sections 24-132 and 24-369 of the Code do not disqualify persons who have failed to meet the requirements set forth from being candidates, but merely denies to them the right to have their names printed on the official ballot. I am of the opinion, therefore, that Mr. Shelton is entitled to be certified as a nominee of his party for the office in question.

Should Mr. Shelton be elected in the general election, he will, of course, have to be a qualified voter on January 1, 1960, in order to be eligible to hold the office.
HONORABLE REGINALD H. PETTUS
Commonwealth's Attorney for Charlotte County

I wish to acknowledge your letter of October 14, 1959, which reads as follows:

"Would you please send me a copy of your opinion concerning the propriety of a candidate in the primary being a write-in candidate in the general election.

"Since your opinion, published in the paper several weeks ago, we have had a primary candidate for Clerk to seek to have his name written in. Sample ballots have been made up showing the people how to write the name in, etc.

"The defeated primary candidate is actively campaigning. Is this proper, in your opinion?"

I enclose herewith four opinions recently issued by this office with respect to write-in votes. These opinions are as follows:

July 29, 1959— to Hon. T. E. Campbell
Sept. 14, 1959— Hon. T. W. Downing
Oct. 9, 1959— to Hon. B. W. Seay

You will note that in the last paragraph of the opinion dated September 14, 1959, to Honorable T. W. Downing, I stated that the fact that a person was a candidate in the primary and was defeated would not disqualify him from being elected to the same office by write-in vote. In my opinion, if he should be elected by write-in vote, there is nothing in the statute that would make him ineligible to hold the office to which he has been elected solely on account of the fact that he was an unsuccessful candidate in the primary for the same office.

In the last paragraph of your letter you advise that the defeated primary candidate is campaigning actively, and ask my opinion as to the propriety of this. Please understand that this letter is confined solely to the eligibility of a defeated primary candidate to hold an office to which he is elected by write-in vote. I deem it improper for me to express my personal opinion on the propriety of this action. Such is not within the province of the Attorney General in an official opinion.

HONORABLE ROY V. WOLFE, JR.
Member of the Senate

This is in reply to your letter of October 6, 1959, which reads as follows:

"There are several citizens in Scott County who have paid their poll taxes for the years 1956-57-58 and who have receipts therefor, whose names do not appear on either the certified list of voters or the revised certified list of voters.

"In your opinion may these citizens be permitted to apply for and cast their ballots by presenting their poll tax receipts to the precinct..."
judges of election on election day, or are they disqualified from voting in this year's election due to their being omitted from the voting lists?

In this connection, I enclose copy of an opinion which was furnished to Honorable Levin Nock Davis, Secretary of the State Board of Elections, on April 5, 1955, which answers the question presented by you. This opinion is published in the Report of the Attorney General for 1954-55, at page 95.

This office has consistently ruled on several occasions that the certified list is conclusive except for those voters who have transferred from one county or city to another county or city. In any case where a person has paid his poll taxes within the time prescribed by law and his name does not appear upon the certified list as posted pursuant to the provisions of Section 24-121 of the Code, such person may have the list corrected in the manner prescribed in Section 24-123 of the Code. Unless he does proceed under this section and obtains an order from the court directing his name to be placed upon the certified list, in my opinion, he is not entitled to vote, even though his taxes may have been paid.

ELECTIONS—Certificates by County Party Chairmen—Delivery by Mail—Postmarked on Last Day Complies With Statute. (58)

August 17, 1959

Honorable Levin Nock Davis
Secretary, State Board of Elections

This will acknowledge your letter of August 14, 1959, with respect to certain certifications made by county chairmen pursuant to Section 24-345.3 of the Code. These certifications were postmarked July 24, 1959, which was the last day they could be made under the statute and were received in due course through the mail.

In my opinion, you would be justified in certifying the names of the candidates to the local electoral boards. The candidates involved have done all that is required of them under the statutes. The party chairmen, I feel sure, were of the opinion that certifying and depositing the papers in the custody of the United States mail not later than July 24th was in compliance with the statute.

I understand from additional information that in one case before you there is no opposition to the candidates involved, and in the other case, the chairmen of both political parties certified and mailed the papers to you on July 24th. In these cases, therefore, these names would not be placed on the ballots in opposition to any candidates whose certifications were made on time. I do not feel that in such a case you should refuse to treat the certifications as having been received within the ten day period.

ELECTIONS—Cities—Referenda—Council May Not Hold Advisory or Binding Referendum Without Statutory Authority. (254)

March 2, 1960

Honorable Harold M. Burrows
Member of House of Delegates

This is in response to your letter of March 2, 1960, which reads as follows:

"After the first referendum on public housing has been held, which is
authorized by special act, not by the city charter, is the city council authorized to hold another referendum on public housing, advisory or binding, if this referendum is not authorized in the city charter? Is the city council authorized to use the election machinery for such a referendum, advisory or legally binding, if it is not authorized in the city charter? Is the city council authorized to spend the money to hold such a referendum, advisory or binding, if it is not authorized by the city charter?

"The above is assuming that no act of the Legislature has been passed to enable them to hold such a second referendum, either legally binding or advisory."

As I pointed out to you in my opinion of February 23, 1960, relative to a similar matter, the governing body of a city is not authorized to expend public moneys for a referendum unless such referendum is authorized by law. If there is no provision contained in a city charter authorizing the holding of an advisory or binding referendum, I am of the opinion that the city council may not use the election machinery to hold such a referendum.

ELECTIONS—Cities—Referenda Not Authorized by Law May Not be Held. (246)

Housing Redevelopment Authorities—May Not be Abolished After Favorable Referendum. (246)

Honorable Harold M. Burrows, Jr.
Member, House of Delegates

This is in response to your letter of February 23, 1960, in which you ask the following questions relative to the holding of a referendum by a city when the holding of such referendum is not authorized by law.

"(1) Can a referendum be called by a governing body, such as City Council if the referendum is not authorized in the City Charter or Code of Virginia?

"(2) Does holding a referendum (in conjunction with a Council Election or other authorized election) which is not authorized become permissible, that is, can it be held since there is seemingly no extra expense involved due to a voting machine having slots for such referendum? (Charlottesville uses voting machines).

Honorable J. Lindsay Almond, Jr., former Attorney General of Virginia, expressed the view in an opinion to Honorable Robert C. Goad, Attorney for the Commonwealth for Nelson County, (Report of the Attorney General, 1949-50, page 12) that in the absence of specific legislative authority, the governing body of a county could not hold an advisory referendum. (A copy of this opinion is enclosed). I am constrained to believe that this opinion is also applicable to the governing body of a city and that, therefore, such governing body, unless authorized by the city charter or by general law, may not hold a referendum. I also concur in the views expressed in the aforementioned opinion that the election machinery may not be used in the holding of a referendum which is not authorized by law. There is no authority vested in the city council to expend public moneys for such a referendum. Even if the referendum were held in conjunction with a regular election, there would be extra expenses involved which the city council is not authorized to pay.
You ask the following questions relative to the “Housing Authorities Law” (Chapter 1, Title 36 of the Code of Virginia):

“(1) By what procedure can a Housing Redevelopment Authority be abolished in a locality once a referendum is held and a need for the Authority is established?

“(2) Can another referendum be held later, before construction of a project, if the people of the community feel a change in the feeling of a need for the Authority has arisen? And can this referendum be held unless authorized by an amendment to the City Charter (there not being any authorization seemingly in the Code of Virginia)? There is no authorization in the Code of Virginia for a second referendum is there?”

After a referendum has been held in conformity with the provisions of § 36-4.1 of the Code, as amended, and the need for the Authority has been established, such Authority may not be abolished under existing law. I have heretofore had occasion to consider this question in an opinion rendered to Honorable James M. Thomson, Member of the House of Delegates, (Report of the Attorney General, 1958-59, page 228) and I am enclosing a copy of that opinion for your information.

With reference to your second question, your attention is directed to § 36-19.3 of the Code, which section makes provision for a referendum under certain conditions. Section 36-19.3 reads as follows:

“Notwithstanding the provisions of § 36-19, no authority heretofore or hereafter permitted to transact business and exercise powers as provided in § 36-4 shall, in any city containing a population in excess of twenty-five thousand but not in excess of thirty-five thousand, make any contract for the construction of any housing not authorized or approved by the governing body of the city on January 1, 1959, or acquire land or purchase material for the construction or installation of any sewerage, streets, sidewalks, lights, power, water or any other facilities for any housing not authorized or approved on such date, unless or until the construction of such housing shall have been approved by a majority of the qualified voters of the city voting in an election called by the governing body of the city for the purpose. The procedure for such election shall conform to general law. The provisions of this section shall not affect or impair the provisions of § 36-19.1 of the Code.”

I am advised that the validity of this section is now being tested in the courts and I, therefore, express no opinion relative to the same. I can find no other provision of law which would authorize the “second referendum” mentioned in your question.

ELECTIONS—Cities and Towns—Candidates for Local Office Not Required to File Notice with State Board. (169)

Honorable Levin Nock Davis
Secretary, State Board of Elections

This is in reply to your letter of November 24, 1959, in which you enclosed two letters—one from the Chairman of the Democratic City Committee of Win-
chester, and one from Mr. Alexander N. Apostolou of Roanoke, Virginia. Mr. Rosenberger's and Mr. Apostolou's questions are respectively, as follows:

"As we are having a Democratic Primary next year in April, for Council of the City of Winchester, Virginia, please advise what the filing dead line on the election would be and also for the July Primary next year.

"A question has come up concerning the Declaration of Candidacy for local city office.

"The contention of some is that under Section 24-345.3, Declaration of Candidacy for Primary must be filed 90 days in advance of the primary. On the other hand, it is my contention that local and city Declaration of Candidacy is filed under Section 24-370, requiring 60 days prior to the primary election. I would appreciate it if you would set me right so that I may advise such prospective candidates as to the proper filing period and so that we may avoid confusion and uncertainty."

Section 24-345.3 of the Code was amended by Chapter 309 of the Acts of Assembly of 1958. The effect of this amendment was to limit the application of this section to "any office to be filled by election by the voters of the State at large or of any Congressional district, House of Delegates district or State Senatorial district." The amendment deleted and repealed that portion of this Code section relating to the requirements for party nominees with respect to filing for mayor and members of council in cities and towns on or before the first Tuesday in April next preceding the election of such officers. Prior to this amendment the proper authorities of each political party were required to certify the names of their candidates for such offices to the chairman of the electoral boards, if required, and to the State Board of Elections not later than ten days after the day on which the nominations were made.

At the 1959 special session of the General Assembly, the first paragraph of Section 24-345.3 was amended so as to include again those requirements of candidates in a primary for city and county offices. The second paragraph was not amended at the 1959 special session and, although paragraph one of this section was amended so as to include cities and counties, the second paragraph was not so amended and the only reference in the second paragraph to a primary is the July primary. No reference whatsoever is made in this second paragraph to the requirements with respect to the obligations of party officials to certify the names of nominees for city offices.

The 1959 amendment did not restore any of the language which appeared in Section 24-345.3 relating to filing in an April primary previous to the 1958 amendment.

While it may have been the intention of the 1959 amendment to restore those provisions which were originally in this section relating to nominations and filing with respect to city and town elections held in June of each year under Section 24-136 of the Code, the amendment does not accomplish that purpose. The only effect of the 1959 amendment was to restore that requirement originally contained in this section to the effect that candidates for county and city offices at an election to be held in November under Section 24-136 of the Code should file with the State Board of Elections not later than ten days after the July primary, or a run-off primary, held for the purpose of nominating candidates for such election.

Therefore, in my opinion, Section 24-345.3, as last amended, does not require a candidate for mayor or city council to file with the State Board of Elections for any city office to be nominated at an April primary or to be elected at the regular June election.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Eligibility of Candidate—Electoral Board Not Required to Determine Challenge to Qualification on Ground of Non-Citizenship. (51)

August 11, 1959

HONORABLE EUGENE E. HUFFMAN
Secretary of Craig County Electoral Board

This is in reply to your letter of August 8, 1959, which reads as follows:

"The Craig County, Virginia Electoral Board would like to have an opinion from you with reference to a controversy that has arisen in this County between the two candidates for office of Commonwealth's Attorney.

"Thurman Britts has filed a protest with this board, claiming that the other candidate, Elridge Carper Huffman, is not a resident of Craig County.

"Mr. Huffman has filed a statement that he is, and has been, a life long resident of Craig County. Mr. Britts is trying to keep Huffman's name off the ticket, for the above stated reason.

"I am enclosing you all the papers that have been filed with this Board, and would respectfully request that you render us an opinion in this matter at your earliest convenience."

The question to be determined by the Electoral Board is whether or not Mr. Huffman is entitled to have his name printed on the official ballot. In my opinion, this depends upon whether or not his notice of candidacy and petition were properly filed and whether he is a registered voter in Craig County and has paid his poll taxes so as to be entitled to vote in the next general election.

If the statutory filing procedure has been followed and, in so far as the official records disclose, it appears that Mr. Huffman is a registered voter and qualified to vote by reason of poll tax payments, and, if the county clerk has certified his candidacy to the Electoral Board in the manner prescribed by Section 24-135 of the Code, the Board is then charged with the duty under Section 24-213 of the Code to print his name upon the official ballot.

The Board has before it a protest filed by Mr. Thurman Britts in which he makes the charge that during the past four years, or approximately that period of time, Mr. Huffman has been a citizen of the State of South Carolina and that he did not re-establish his citizenship in Virginia until July 2, 1959, and that, therefore, he is not a qualified voter within the State of Virginia under the provisions of Section 18 of the Constitution which requires one year's residency in the State as a prerequisite to the right to vote. If the allegation made by Mr. Britts is true, of course, Mr. Huffman will not be a qualified voter in the November election and, therefore, would not be entitled to have his name placed on the official ballot and, furthermore, he would not be a qualified voter on January 1, 1960, and, hence, would be disqualified from holding the office to which he aspires.

This is a serious charge and the burden is upon the person making it to overcome the presumption created by the facts of poll tax payments and registration. The question raised by Mr. Britts involves Mr. Huffman's entitlement to the office as well as his right to have his name printed on the ballot.

I feel that the duties of the Electoral Board are largely ministerial. I am constrained to the view that the Board is not charged with the obligation of passing upon a question of this nature. However, I feel that if the Board has serious doubt as to whether or not Mr. Huffman is a qualified voter it may, if it desires, notify Mr. Huffman and Mr. Britts that it will defer or delay the printing of the ballots for a reasonable time in order to give these gentlemen an opportunity to have the question determined in a court of competent jurisdiction in an appropriate proceeding instituted in that court by one of the candidates. If no
action should be taken by either of the candidates within the time fixed by the Electoral Board, then I feel that, under the circumstances, and in view of the presumption which is manifestly in Mr. Huffman's favor, the Board should proceed to print the ballots in accordance with the certification made to it.

ELECTIONS—Eligibility of Candidates—May be Elected to Two Offices at Same Election but can Qualify for and Hold only One Office. (113)

October 7, 1959

HONORABLE E. A. CHRISTIAN
Justice of the Peace for Louisa County

This is in reply to your letter of October 6, 1959, which reads as follows:

"I am writing to inquire if it is legal for a voter to vote for the same person for two different offices on the same ballot?"

"My reason for asking you this question is that I am a candidate for Supervisor in my district in the Nov. 3rd election with my name on the ballot in due form and will probably be elected, but since I have been a Justice of the Peace here for 24 years a lot of my friends should be defeated are anxious for me to be reelected as J. P. and since there is no candidate for that office would give me write-in votes if it was legal."

"I realize this is quite an unusual situation but would like to have your opinion on the matter for while I know the Virginia law gives a voter the right to write-in any name he desires in place of the names on the ballot there is a question in my mind whether or not it would be legal to vote for me as Supervisor and then give me a write-in vote for Justice of the Peace on the same ballot."

In this connection I am enclosing copy of an opinion issued by this office on May 11, 1950 to Honorable W. H. Lineweaver, Secretary of the Electoral Board of Rockingham County. This opinion appears in the Report of Attorney General for 1949-'50, at page 100.

I know of no reason why a write-in vote for the office of Justice of the Peace would not be valid. Such a vote, however, would have to be cast in the manner set forth in Section 24-252 of the Code, which reads as follows:

"It shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check or cross mark or a line immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

In the event you should be elected to both offices you, of course, would be unable to qualify and hold but one office. If you should qualify, for example, for the office of member of the board of supervisors, you could not continue to hold that office and at the same time hold the office of justice of the peace.
ELECTIONS—General—Notices of Candidacy of Other Than Party Nominees—Must be Filed with State Board of Elections. (49)

Honorable Levin Nock Davis
Secretary, State Board of Elections

This is in reply to your letter of August 7, 1959, to which is attached a letter dated August 6, 1959, written to you by Mr. A. D. Goodwin, Secretary of the Electoral Board of Roanoke County. Mr. Goodwin states that three gentlemen filed their notices of candidacy with accompanying petitions with the Clerk of Roanoke County for the offices of sheriff and member of the board of supervisors for the general election to be held in November of this year. These papers were filed not later than July 24, 1959. It is stated that these gentlemen are not party nominees, but are independent candidates.

You state that neither of these candidates filed a notice of candidacy and petition with the State Board of Elections.

You request my opinion as to whether or not these candidates are entitled to have their names printed on the official ballot for the general election to be held on November 3, 1959.

In my opinion the Electoral Board of Roanoke County does not have authority to print the names of these candidates on the official ballot for the election in question. Section 24-345.3 of the Code provides that:

"All candidates for said offices other than party nominees shall file their notices of candidacy and petitions, if same are required by chapter 8 (§ 24-130 et seq.) of this title, within ten days after the Tuesday after the second Monday in July unless a second primary be required, in which event any such candidate shall file his notice of candidacy and petition within ten days following the day of such second primary with the Board, and also with the clerk or other officer, when same is required by law. The name of no candidate for any office required by this section to be certified to the Board whose name is not so certified, or whose notice of candidacy, if the filing of such a notice is required by such chapter of the Code, is not filed within the time required by this section, shall be printed on any official ballot for said election."

The candidates under consideration here were required to file their notices of candidacy and petitions under Chapter 8 of Title 24 of the Code, and actually did file these papers with the Clerk of the county pursuant thereto. They did not file a notice and petition with the Board. Board, as used in this section, means State Board of Elections.

This is a matter which you have discussed with this office on several occasions within the past few days, and this opinion confirms the views of this office as stated to you during these discussions.


ELECTIONS—Independent Candidates—Declaration and Petitions Filed Late—Name Should Not be Printed on Ballot—If Printed and Wins May Serve. (59)

Honorable Martin F. Clark
Commonwealth's Attorney for Patrick County

This is in reply to your letter of August 17, 1959, which reads as follows:
"An independent candidate for the Board of Supervisors of Patrick County filed with the Clerk of the Circuit Court of Patrick County his declaration of candidacy and petitions on Friday, July 24, 1959. A copy of the declaration of candidacy and a copy of the petitions were immediately mailed to the Office of the State Board of Elections in Richmond, Virginia, and were received by that office sometime subsequent to midnight July 24th.

"The State Board of Elections has advised the Patrick County Electoral Board that by reason of the independent candidate's declaration of candidacy and petitions not being filed with that office as required by Section 24-345.3 of the Code as amended, that the name of the independent candidate should not be printed on the official ballots for the General Election to be held on November 3, 1959. Two questions present themselves:

"(1) If the Electoral Board of this County placed the name of the independent candidate on the ballot, would there be any criminal or civil responsibility on the local Electoral Board or on the individual members thereof.

"(2) If the name of the independent candidate was placed upon the ballot and he was the successful candidate, could his right to hold office be successfully challenged?"

With respect to your question (1), the members of the local electoral boards are officers established under the provisions of Section 31 of the Constitution of Virginia.

You are, I feel sure, familiar with the provisions of Article 3, Chapter 16, of Title 15 of the Code in which the procedure is provided for the removal of officers for any of the reasons set forth in Section 15-500 of the Code. In my judgment, should any person wish to proceed against these officers, it could be done only under the provisions of this Article. I know of no criminal action that could be taken.

In the event this candidate's name should be placed on the ballot under the circumstances existing, and he should be elected, I am of the opinion that his right to qualify and hold the office cannot be successfully challenged upon the ground that his name was printed on the ballot in the manner and under the circumstances existing.

ELECTIONS—Notices of Candidacy—General Law Prevails over Charter Provision Where Conflict. (156)

November 17, 1959

HONORABLE W. L. PRIEUR, JR.
Clerk of Courts, City of Norfolk

This is in reply to your letter of November 13, 1959, in which you request my advice as to whether or not the provisions of Section 24-345.3 of the Code relating to the qualification of candidates is applicable to the election of members of the city council for the city of Norfolk at the June 1960 election.

We have had occasion to look into this question for another city in the State and we have concluded that the amendment to this section by Chapter 17 of the Acts of special session of the General Assembly of 1959 failed to restore the requirement that candidates for city offices (other than party nominees) shall file their notices of candidacy "within ten days after the first Tuesday in April." Therefore, in as much as you do not have a primary in the city of Norfolk for
these offices, the provisions of this section with respect to filing will not apply.

The provisions of the charter of the city of Norfolk appear to be in conflict with Sections 24-131 and 24-133 of the Code.

This office has heretofore expressed doubt as to the validity of special charter provisions with respect to the conduct of elections which vary from the provisions of general law. This doubt has been raised on account of the provisions of paragraph 11 of Section 63 of the Constitution, which reads as follows:

"The General Assembly shall not enact any local, special or private law in the following cases;

* * *

"11. For conducting elections or designating places of voting."

Attorney General Almond ruled in an opinion to the Galax Electoral Board that where the charter provision is in conflict with general law relating to the conduct of elections, it is unconstitutional. You can find this opinion in the Report of the Attorney General for 1955-'56, at page 62. Campbell v. Bryant, 104 Va. 509, 513, 514.

There are later cases not easily reconcilable with Campbell v. Bryant, but we have been unable to conclude that the case has been overruled as to this specific point.

While it is true that under Section 117 of the Constitution special laws may be passed for the organization and government of cities and towns, nevertheless, there is doubt whether this constitutional provision authorizes a charter of a municipality to contain provisions relating to the conduct of elections which are different from the general statutes.

I have brought this matter to your attention so that you may exercise your discretion in advising prospective candidates to file their notices of candidacy and petitions in accordance with the Code sections to which I have referred.

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ELECTIONS—Polls—Time for Opening and Closing of—Arlington County Election Conducted on Daylight Saving Time. (324)

April 26, 1960

Honorable Levin Nock Davis
Secretary, State Board of Elections

This is in reply to your letter of April 25, in which you state that the governing bodies of Arlington and Fairfax counties and the cities of Falls Church and Alexandria have adopted resolutions pursuant to the provisions of § 15-24.2 of the Code providing for and enforcing daylight saving time. In the county of Arlington a special election will be held on May 17, 1960, and the general registrar of that county has requested advice as to whether the election should be held between the hours of 6:00 A.M. and 7:00 P.M., D.S.T., or 7:00 A.M. and 8:00 P.M., E.S.T.

It is my understanding that Arlington county has a population of more than one thousand per square mile according to the last preceding United States Census.

§ 24-182 of the Code is the general statute on this subject and provides that at all elections the polls shall be opened at each voting place at 6:00 A.M., E.S.T., and closed at 7:00 P.M., E.S.T.

§ 15-24.2 of the Code is an exception to the general law and if Arlington county qualifies by meeting the population requirements, in my opinion, the election in that county should be held from 6:00 A.M. to 7:00 P.M., D.S.T.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Poll Taxes—Evidence of Payment of—Certificate or Receipts Exhibited by Transferring Voter Must be Executed by Treasurer of County or City in Which Such Taxes Were Paid. (16)

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of July 10, 1959, requesting me to confirm in writing my verbal statement made on yesterday regarding the procedure to be followed by a person offering to vote in a jurisdiction where he has resided for less than three years next preceding the year in which he offers to vote and who, for that reason, has paid his poll taxes in another jurisdiction for one or more of the three preceding taxable years.

Under the provisions of Section 24-128 of the Code of Virginia, any person who has been transferred from one jurisdiction to another and who has paid his State poll taxes for the three years next preceding that in which he offers to vote, or any of said years, may exhibit to the judges of election in the precinct in which he offers to vote a certificate or receipts of the treasurer of the county or city in which he paid the poll taxes showing such payment and that payment was made at least six months prior to the date of the election (which would be six months prior to November 3, 1959 for the primary to be held on July 14, 1959), and such certificate shall be conclusive evidence of the facts therein stated for the purpose of voting, provided the voter shall also take the oath prescribed by Section 24-254 of the Code.

In answer to your question as to whether or not a certificate or receipt signed by the treasurer of the county in which the person currently resides to the effect that such person has paid his poll taxes for any of the three preceding years in another county or city is sufficient, you are advised that such certificate by such treasurer would not be in compliance with the statute. The certificate with respect to the payment of the person’s poll taxes for any year, in order to be valid and evidence of the payment of his poll taxes, must be signed by the treasurer of the county or city to whom such poll tax was paid.

For the purpose of illustration, assume voter “A” has transferred his registration from county “B” to county “C” during the year 1959. Voter “A”, formerly resided in county “B” on January 1, 1956, 1957, and 1958 respectively. This voter, in order to vote in county “C” (where he now resides), will be required to produce to the judges of election a certificate or receipt, pursuant to Section 24-128 of the Code, showing that he paid his poll taxes in county “B”. This certificate must be signed by the treasurer of county “B” (where the taxes were paid) in order to be valid. If the certificate or receipt is executed by the treasurer of county “C” (the county to which he moved and in which he offers to vote) it is not sufficient.

ELECTIONS—Referenda for Removal of County Courthouse—Qualified Voters—Freeholders—Majority of all Votes Cast Necessary—Mail Ballots. (270)

HONORABLE MAJOR M. HILLARD
Clerk of Circuit Court of Norfolk County

This is in reply to your letter of March 16, 1960, which reads as follows:

“The Norfolk County Board of Supervisors, in accordance with statutes made and provided, has passed a resolution requesting the Judge of the
Circuit Court of Norfolk County to issue a writ of election calling for an election to remove the court house from Portsmouth, Virginia, to Great Bridge. In accordance with this resolution, the Judge of the Circuit Court of Norfolk County has issued a writ of election directing the Sheriff to call an election on the 24th day of May to determine the issue.

"We are in doubt as to many points in the law set out in the Code for the special election for the removal of the court house and, in order that an election may be properly held, we are requesting you to advise us on the following points:

"1. Is our assumption true that a person, in order to vote as a free-holder, must, also, be a qualified voter in the county and in the precinct in which he offers to vote? We take our assumption from the following words in Section 15-43: 'Whenever one-third of the qualified voters of any county, of whom at least one-half must be free-holders, shall—petition the Judge of the Circuit Court of the county for a special election, etc."

"2. Who is a free-holder and how are the judges of election to determine whether or not the person applying to vote is a free-holder? In other words, would it be necessary for the person voting to produce any evidence to the judges of election showing that he is a free-holder, or should the judges assume that the person making application to vote as a free-holder is a free-holder, unless he should be challenged?

"3. Is this assumption true? That there must be a majority of all of the votes cast—that is, free-holders and other qualified voters and a majority of the free-holders separately for the removal of the court house.

"4. Should a person requesting a mail ballot request the type of ballot he is entitled to vote, or does he merely have to request a ballot and have both ballots sent to him in order that he may choose which ballot he is entitled to use?"

"We would like to have the opinion of your office as soon as possible in order that the people of the county may have the proper information as quickly as possible."

Your questions will be answered in the order stated:

1. This question is answered in the affirmative. Each person must be a qualified voter under the provisions of Title 24 of the Code in order to vote in the election. As to who is a qualified voter in this special election, I call your attention to § 24-22 of the Code. Under this section any person who was qualified to vote in the November 1959 election may vote in a special election held in May of this year, although such person may have failed to pay his poll tax in time to qualify to vote in the June 1960 election. Furthermore, any person who may not have been qualified to vote in the November 1959 election, may vote in this special election if he is qualified to vote in the June 1960 election. Therefore, the poll tax list for the last November election and the list for the June 1960 election should both be in the hands of the judges of election at each precinct.

2. With respect to who is a freeholder, you are referred to Minor on Real Property, Volume 1, Section 139, in which this question is discussed by Mr. Minor. It may be that there is a later edition of Minor on Real Property and that the citation to the section number may be different. I assume that you or some of the other attorneys in Portsmouth have this text book. If not, we shall be glad to make you a copy and mail it to you. Any person who owns an interest in real estate of an indeterminate duration would seem to qualify as a freeholder. This would include a widow who has a dower interest or a widower who has a curtesy interest. It would not, however, include the wife or husband of a
spouse who owns property since the inchoate right to dower or curtesy would not constitute a freeholder. Of course, where property is held jointly by husband and wife, each would be a freeholder and this would be true if they hold the estate as tenants by the entirety. I find in a discussion of this question in Words and Phrases that the courts have held that a person who is in possession of real estate under a lease for an indefinite term, such as for his life or for the life of someone else, would be a freeholder.

With respect to how the judges of election shall determine whether or not a voter is a freeholder, I find that there is no statutory provision, but, of course, the judges of an election have the right to pass upon the qualification of persons offering to vote. I think that the burden would be upon the person claiming to be a freeholder to produce satisfactory evidence on that point to the judges of the election. Of course, in many instances the judges will know whether or not a voter qualifies in that classification. I assume that any voter who offers to vote as a freeholder would be willing, if required to do so, to answer under oath questions propounded to him by the judges. A judge of election would have the right to administer an oath to the voter in connection with this matter.

(3) I am of opinion that it is necessary that a majority of all the votes cast be in favor of the removal of the courthouse—that is, the total of the votes in both ballot boxes must show a majority. In addition, it is also necessary that the freeholder's box show a majority of the freeholders voting have voted for the removal of the courthouse.

With respect to question 4, there is nothing in the statutes which requires that there shall be printed two types of ballots. I believe, however, that the judge in his order could specify that two types be printed. If there are two types of ballots then any person who wishes to vote a freeholder ballot should make specific request therefor. If there is only one type of ballot, then the person who votes by mail should accompany his ballot with a statement as to whether or not he is a freeholder. Of course, whenever any ballot is received by mail, the judges of election, when opening the envelope containing the ballot, shall then determine whether or not it is a freeholder vote or non-freeholder vote and deposit the ballot in the appropriate box.

§ 24-141 of the Code provides how ballots shall be prepared in cases of a referendum, and no provision is made for more than one ballot on which shall be stated the question.

ELECTIONS—Registrars—Authority of County Electoral Board Over. (243)

HONORABLE LINWOOD E. TOOHLAS
Secretary, Henrico County Electoral Board

This is in reply to your letter of February 16, 1960, which reads as follows:

"I am in receipt of a reply to my letter to Mr. Levin Nock Davis regarding the proposed night registration of voters in Henrico County, as well as a copy of your opinion in this matter.

"The last paragraph of your letter states in effect that in your opinion, the electoral board is not authorized to require the registrar to sit except during customary business hours during the day.

"Would you please advise whether the word 'require' is a controlling factor of your opinion, and if there would be any prohibition against night registration should the electoral board and the registrar voluntarily agree to this arrangement, in order to accommodate the voter."

Registrars appointed under the provisions of Chapter 6 of Title 24 of the Code are public officers and their duties and responsibilities are as prescribed in the
election laws. None of the provisions of Chapter 6 confer upon the electoral board any powers of supervision over the registrar, except that the electoral board does have the power to direct the registrar to purge the registration books. This authority is contained in Section 24-106. The electoral board may, by resolution, designate places and days, other than at the general office of the registrar, for the registrar to sit and receive applications for registration during usual business hours. The registrar is not an employee of the electoral board.

Of course, there is nothing in the statutes which would prohibit a registrar from voluntarily agreeing with the electoral board to register persons at any time and place within his jurisdiction.

ELECTIONS—Registrars—Duties—Power of Board of Supervisors to Require Evening Hours. (234)

February 11, 1960

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of February 9, 1960, to which you attached a letter from the Secretary of the Electoral Board of Henrico County and a letter from Honorable William F. Parkerson, Jr., Commonwealth’s Attorney of Henrico County, both of which relate to the duties of the general registrar and the authority of the electoral board of the county to require the general registrar to sit at one of the schools in each district for approximately two hours in the evening in order to accommodate those who are unable to make a trip to the registrar’s office at the courthouse.

As pointed out by Mr. Parkerson, the position of general registrar in Henrico County was established under the provisions of Section 24-118.5 of the Code. Section 24-118.6 requires the governing body of the county to furnish the general registrar with a suitable office, furniture and equipment. It further provides that the registrar shall sit at such place or places in the county as may be designated by the electoral board and on such day or days in each month as the electoral board may designate. Under this section, the electoral board does have the authority to designate places outside of the courthouse where the general registrar shall sit on specified days for the purpose of registering the voters. This section, however, does not, in my opinion, authorize the electoral board to require the registrar to sit at any such places for the purpose of registering voters except during the customary regular business hours during the day. There is no statute which requires a registrar to be available at night for the purpose of taking the applications of persons who wish to register.

ELECTIONS—Registration—Registrar Must Accept Application of Person Not Assessable for Poll Tax Under Section 21 of Constitution. (207)

January 14, 1960

HONORABLE FELIX E. EDMUNDS
Member, House of Delegates

This will acknowledge your letter of January 12, 1960, which reads as follows:

"It is provided by Section 26 of the Virginia Constitution that,

"‘Any person who, in respect to age or residence, would be qualified to vote at the next election, shall be admitted to registration, not-
withstanding that at the time thereof he is not so qualified, and shall be entitled to vote at said election if then qualified under the provisions of this Constitution.'

"There are also a number of statutes covering the manner of registration of persons who at the time thereof are not qualified but will be qualified at the next election. There have been a number of instances where registrars in this area have refused to permit registration without a receipt for payment of poll tax even though the poll tax does not become due and payable under the law until some months later.

"Please advise if in your opinion any registrar can properly and lawfully refuse to register an applicant under the above provisions of the Constitution when such applicant does not have a receipt showing pre-payment of poll tax to be assessed and made payable at a subsequent date to registration."

I am enclosing copy of an opinion dated March 1, 1955, to Mark D. Woodward, which construes Section 21 of the Constitution. This opinion is published in Attorney General's Report for 1954-'55, at page 96-97. Under this opinion, if a person offers to register in the calendar year during which he became 21 years of age subsequent to January 1st of such year, he is entitled to register without the payment of any poll tax. For example: if a person became 21 years of age in March 1959 and offered to register at any time prior to December 31, 1959, he was entitled to register without the payment of poll taxes. However, if such person did not offer to register in the year 1959 but offers to register in the year 1960, he will have to pay $1.50 as a prerequisite to register because of the fact that on January 1, 1960 he was assessable for $1.50 poll tax.

Section 26 of the Constitution which you have quoted in your letter provides that if a person will be 21 years of age on election day he may register for that election, although at the time he is required to register he will not be 21 years of age.

Specifically answering the last paragraph of your letter, in my opinion it is the duty of the registrar to take the application of a person who offers to register if such person under Section 21 of the Constitution has not paid any poll tax, provided such person is not assessable for any poll tax for the year in which he offers to register or any preceding year.

ELECTIONS—Registration—Transfer of When Town Annexes Part of County—Purge of Books. (181)

December 11, 1959

Honorale Levin Nock Davis
Secretary, State Board of Elections

This is in reply to your letter of December 9, 1959, to which is attached a letter from Honorable C. H. Eley, Chairman of the Electoral Board for Southampton County, in which he presents the following questions:

"No. 1. The town of Franklin, Southampton County, effective January 1, 1960 is annexing more than double their present area in square miles. The present area 1.02 square miles, new annexation is 2.90 square miles, making a total area of 3.92 square miles, also an increase of about 2300 or more population. And expecting 900 to 1000 more qualified voters to be added to four registration books.

"Will it be within the law to take a list prepared by the town,
showing names, addresses and race and check against the General Registrar's books for the Franklin Magisterial District and those having duly registered for the district, copy same on town's registrar's books without a request from voter?

"No. 2. Does the person selected by the Electoral Board for the county to purge the registration books of each voting district or precinct have to appear at the General Registrar's office to purge their respective voting precincts?

"No. 3. I have been asked several times by the sheriff's department and also by the State troopers located in Southampton County to petition the court asking that I be appointed a justice of the peace for Franklin district to write warrants and set bond. Would I have to resign from the Electoral Board of Southampton County?

"No. 3-a. We have a very good man who has been serving on the polls for Franklin precinct for several years as a judge and also a commission. He was elected justice of peace by write-in votes in the Nov. 3rd, 1959 general election.

"Will this keep him from being eligible to serve on the polls in the future?"

I will answer the questions in the order presented:

1. I enclose copy of an opinion furnished to the Commonwealth's Attorney of Warren County, which, I believe, covers this question. The opinion is dated April 25, 1950, and is published in the Attorney General's Report for 1949-'50, at page 113. You are also referred to Sections 24-56 and 15-152.24 of the Code. The answer to the question is in the affirmative.

2. Section 24-107 of the Code is applicable. Under this section the General Registrar shall give the notices therein required and any hearings held by him shall, by the terms of this section, be "at his office." It is suggested that the Electoral Board and the General Registrar should follow the procedure prescribed in Sections 24-96 through 24-112 in purging the registration books.

3. I call attention to Section 31 of the Constitution of Virginia and Section 24-31 of the Code. While these provisions do not expressly provide that a person already a member of the electoral board shall be ineligible to remain a member thereof after he is elected or appointed to another office, it is my opinion that the effect of these provisions is to render the holding of the office of member of an electoral board and another office by the same person is improper. The effect of these provisions is to make the offices what is generally referred to as "incompatible offices," that is, offices which cannot properly be held at the same time by one person. It is my opinion, therefore, that this person may not properly qualify for the office of justice of the peace until after he has ceased to be a member of the electoral board.

No. 3-a. In my opinion this person may qualify and hold the office to which he was elected by a write-in vote. However, while holding the office to which he was elected he will not be eligible to act as a judge of any election.

ELECTIONS—Residence of Candidate—Justice of the Peace—Write-In Vote—De Facto Officer—May Issue Criminal Warrants Within Any District of County. (20)

HONORABLE ALONZO BEAUCHAMP
Commonwealth's Attorney for Russell County

July 16, 1959

I acknowledge receipt of your letter of July 13, 1959, which reads as follows:
"I will thank you to advise me on the following matter:

"We have a Justice of the Peace in Russell County who was allegedly elected in the last County Election by a write-in vote in a district where he had voted for several years, but who was an actual bona fide resident of another district for more than thirty days prior to the election. Was he legally elected? And are the criminal warrants issued by him legal?

"I would also like to have your opinion as to whether a Justice of the Peace can legally issue a criminal warrant in any other district than that in which he was legally elected."

As I understand your letter, the person under consideration was not, at the time of his election to the office of justice of the peace, a resident of the magistrate district for which he was elected to serve. Section 15-487 provides that "Every district officer shall, at the time of his election or appointment, have resided in the district for which he is elected or appointed, thirty days next preceding his election or appointment * * *." This office has expressed the opinion that the place of residence as contained in this section and Section 32 of the Constitution has reference to the actual place of abode as distinguished from the place of legal domicile.

Section 15-488 of the Code provides as follows:

"If any officer, required by the preceding section to be a resident at the time of his election or appointment of the county, city, district or town for which he is elected or appointed, or of the city wherein the courthouse of such county is, remove therefrom, except from the county to such city, or from such city to the county, or in case a nonresident who has been elected Commonwealth's attorney remove from the county or county seat of the county in which he resided when elected, except to the county in which he is elected, his office shall be deemed vacant."

The phrase "required by the preceding section" refers to Section 15-487 and not to Section 15-487.1, which now immediately precedes Section 15-488, since Section 15-487.1 is a new section added to the Code after Sections 15-487 and 15-488 were enacted. You will observe that, under the provisions of Section 15-488, whenever a person ceases to be a resident of any of the jurisdictions therein set forth, the office to which he has been elected shall be deemed vacant.

I assume that the person to whom you refer received the votes necessary for election and, for that reason, he duly qualified for the office in the manner prescribed by law, and that no question was raised at that time concerning his eligibility and qualification to hold the office. Under these circumstances, if he is not qualified due to the question of his place of residence, he is at least a de facto officer and his official acts, in my opinion, are valid. Michie's Jurisprudence, Vol. 15, Section 58, at page 117. Michie's Digest, Vol. 6, page 575; Monteith v. Commonwealth, 15 Gratt (56 Va.) 172; 43 American Jurisprudence, Sections 493, et seq.; McCraw v. Williams, 33 Gratt (74 Va.) 510. And see Section 2-33 of the Code of Virginia and cases cited thereunder.

You inquire whether this person was legally elected. A person may be elected to office by the write-in method. See Section 24-252 of the Code. The problem is not whether he was legally elected, but whether he is legally qualified to hold the office. Unless this person voluntarily relinquishes his claim to the office, a test of his right thereto may be determined by appropriate court proceedings.

With respect to your question as to the jurisdiction of a justice of the peace for the purpose of issuing criminal warrants, I am of the opinion that such warrants may be issued within any district of the county. I enclose an opinion of this office relating to this question. This opinion is published in the Report of the Attorney General for 1953-54, at page 115.
REPORT OF THE ATTORNEY GENERAL

ELECTIONS—Residence of Voters—Charitable Institutions. (205)

HONORABLE H. P. SCOTT
Clerk of Circuit Court of Bedford County

January 12, 1960

This is in reply to your letter of January 7, 1960, which reads as follows:

“The Elks National Home is located in Bedford, Virginia and comes under the heading of a charitable institution for voting purposes as I have understood previous rulings of your office.

“The Home has a number of residents who are paying their own way in every respect and wish to vote in Bedford County but can they do so under the election laws of the Commonwealth of Virginia?”

Section 23 of the Constitution excludes paupers from the privilege of registering and voting. In an opinion dated May 23, 1952, and published in the Report of the Attorney General for 1951-'52, at page 78, this office, in considering an inquiry from Honorable DuVal Radford, took the position that the question of whether a person is a pauper is one to be determined from all the facts in a particular case. Certainly an inmate of the Elks Home or a similar institution who pays for that privilege may not be considered as a pauper within the meaning of Section 23 of the Constitution, and hence may not be deprived of his franchise rights for that reason.

Section 24 of the Constitution provides as follows:

“No officer, soldier, seaman, or marine of the United States army or navy shall be deemed to have gained a residence as to the right of suffrage, in the State, or in any county, city or town thereof by reason of being stationed therein; nor shall an inmate of any charitable institution or a student in any institution of learning, be regarded as having either gained or lost a residence, as to the right of suffrage, by reason of his location or sojourn in such institution.”

This section, in my opinion, provides that the mere fact that a person is an inmate of a charitable institution does not establish his legal residence in Virginia or cause him to lose his legal residence which he has established elsewhere. This constitutional provision does not deprive a person from voluntarily establishing his residence for voting purposes in the locality where such an institution is located. In this connection, I enclose a copy of an opinion rendered by the late Justice Staples during his tenure of office as Attorney General. In this opinion Attorney General Staples held that a student could establish his voting residence where he was attending school. This opinion is published in the Attorney General’s Report for 1937-'38, at page 62.

In my opinion, those persons residing at the Elks Home who are not disqualified for one of the reasons set forth in Section 23 of the Constitution are entitled to establish their place of residence at the Elks Home for the purpose of voting.

ELECTIONS—Towns—Commissioners to Canvass Returns and Break Tie Votes. (365)

HONORABLE J. ROBERT SWITZER
Clerk of Circuit Court of Rockingham County

May 26, 1960

This is in reply to your letter of May 25, which reads as follows:

“The question has been raised whether after town elections, the judges
of the election at each town should be the commissioners to pass on tie votes. See Section 24-277. (Section 24-290, apparently, does not apply to towns.)

"The questions I would like answered are as follows:

"1. Must the returns of all towns be placed before the commissioners of the county or before the judges of each town?

"2. In case of a tie, do the judges of the town in which there is a tie canvass the returns, or is it done by the commissioners of the county?

"3. If there is no tie must the commissioners, never-the-less, canvass the returns?

"4. In case of a tie, do those having an equal number of votes have to be present when the returns are canvassed? Please quote section."

The special provisions pertaining to town elections are contained in Article 5, Chapter 10, Title 24 of the Code. See Sections 24-168 to 24-175, inclusive. In addition, you are referred to Section 24-56 of the Code which provides for the appointment of a town registrar and judges for town elections.

Section 24-173 provides that the judges of the town election shall make duplicate returns of the result. One of the returns, with the ballots sealed up, must be returned to the clerk's office of the county and the other copy of the returns shall be filed by the judges with the town council.

Section 24-175 provides that—

"The manner of receiving ballots and canvassing the vote shall conform to the general law."

You will note that the judges appointed pursuant to Section 24-56 shall also act as commissioners of election. I am of opinion that the judges of a town election, when acting in the capacity of commissioners, should be governed by the provisions of Sections 24-171 to 24-277 of the Code, inclusive, in so far as these sections may be applicable to town elections.

The answer to your question 1 is that the judges of election act as commissioners.

With respect to question 2, the procedure set forth in Section 24-277 shall be followed.

Question 3 is answered in the affirmative. I am not aware of any exception to the requirement that the results of an election must be canvassed by the commissioners.

With respect to question 4, there is no requirement that those candidates having an equal number of votes shall be present when the determination is made under Section 24-277. However, the statute provides that in case of a tie the commissioners "shall proceed publicly to determine by lot which of the candidates shall be declared elected." Therefore, I do not feel that the commissioners are authorized to prevent the interested candidates from being present when the tie vote is broken.

ELECTIONS—Towns—Residence Requirements for Participation. (337)
Elections—Counting Votes—Independent Candidate Entitled to have Representative Present while Votes are Canvassed. (337)

May 6, 1960

HonorabLe Leon Owens
Commonwealth's Attorney for Russell County

I acknowledge receipt of your letter of May 5, in which you present three
questions pertaining to residence requirements for voting in town elections. These
questions are as follows:

“1. Assuming that a person has in the past maintained his home and
place of actual residence within the corporate limits of Lebanon, Vir-
ginia; that this person has in the past been a qualified voter of the
Town of Lebanon, Virginia, and has cast his ballot in previous Town
elections; that he is qualified to vote for members of the General As-
sembly; that subsequent to six months prior to the said Town election
but before thirty days prior to the said Town election, said person moves
to a newly constructed dwelling house which is beyond the corporate
limits of the said Town of Lebanon, but within Russell County, would
the mere fact of the change of the place of abode of this particular per-
son, assuming that he were otherwise a qualified voter in the said Town
of Lebanon, Virginia, defeat his right to vote in the said Town election?

“2. Assuming that a person is a duly qualified voter of Tazewell
County, Virginia, but maintains a residence and actually, physically re-
sides within the Town of Lebanon, Russell County, Virginia, may he
register and vote in the Town election of Lebanon, Virginia. If your
answer to this question should be in the affirmative, would such register-
ing and voting in the Town of Lebanon, Russell County, Virginia,
disqualify said person from casting his vote in the next general election
in the County of Tazewell, Virginia?

“3. Assuming that an individual was an actual resident of Lebanon,
Virginia, at one time but has resided in Bristol, Virginia, for at least
twenty years and has no residence in Lebanon, Virginia, at present but
commutes daily from Bristol to Lebanon to work and has continued to
vote in the Town and general elections in Lebanon, Virginia, and is a
qualified voter in all respects if he is determined to be an actual
resident of Lebanon, is he qualified to vote in the Town election in
Lebanon, Virginia?”

I am enclosing the following opinions which I believe will enable the judges
of election to arrive at a proper conclusion:

Opinion to Honorable J. B. Haywood, dated October 24, 1931, re-
Opinion to Honorable R. J. Bolton, dated December 6, 1939, reported
Opinion to Honorable Frank N. Watkins, dated May 24, 1954, re-
Opinion to Honorable James W. Harman, Jr. dated December 20,

You will note that the place of residence for the purpose of voting turns upon
the intent of the voter. Once a voter has established his residence in a town and
has exercised the franchise right, he does not ipso facto lose that right by moving
to another jurisdiction. If his vote is challenged for that reason, and his qualifica-
tion is tested under Section 24-254 of the Code, and he subscribes to the oath, it
would seem that he would be entitled to vote.

With specific reference to question 2, if this person has lived in Russell county
one year, and in the town of Lebanon six months, he may transfer his vote from
Tazewell to Russell and, upon producing a certificate of the treasurer of Tazewell
county that he has paid his 1957, 1958 and 1959 poll taxes six months prior to the
June election, in my opinion, he may vote in that election. This, of course, would
disqualify him from voting in Tazewell so long as he continues to reside outside
of that county.
Question 3 is answered in the affirmative.
Your question 4 is as follows:

"Assuming that all of the candidates for election to the Town offices are independent candidates not affiliated with a political party in any way, are each of the candidates entitled to a representative in the room where and while the votes are being counted?"

Section 24-260 fails to make provision for representatives except for political parties. Section 24-175 provides that the ballots shall be received and canvassed in conformity with general law. I am constrained to express the opinion that each candidate would be entitled to have representatives in accordance with Section 24-260. This section expressly provides that "the ballots shall not be taken from the ballot box in secret, etc."

ELECTIONS—Voter Registration—Temporary Residence on Federal Reservation Does Not Terminate Prior Status as Resident of State. (257)

February 12, 1960

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of February 10, 1960, to which you attached a letter from Mr. H. Lee Kanter, attorney at law of Norfolk, Virginia, in which the question as to the entitlement of Mrs. Mary B. Carroll to register for the purpose of voting is presented. It appears from the statements made in Mr. Kanter's letter that Mrs. Carroll now lives at Camp Allen, which is a Wherry Housing project, situated on land which is owned in fee simple by the United States. Mrs. Carroll plans to move back to the city of Norfolk on or about March 1, 1960. It is stated that for a period of more than five years Mrs. Carroll had resided in the city of Norfolk and that she has paid the State income tax during the past two years assessable by the State of Virginia. It is stated that the local registrar in Norfolk is of opinion that Mrs. Carroll will have to reside in the city of Norfolk for one year before she will be eligible to register.

If Mrs. Carroll offers to register and in her application states that she has been a resident of the State of Virginia for at least one year or that she will have been a resident of Virginia at least one year prior to the general election to be held in June, 1960, she, if otherwise qualified, will, in my opinion, be entitled to register for the purpose of voting. See Section 26 of the State Constitution.

Mrs. Carroll's temporary residence on a federal government reservation does not in itself have the effect of terminating or suspending the resident status that she established during the time she has lived in the State of Virginia prior to the time she moved to Camp Allen. The question of residence is largely one of intention. Once a person has become a resident of the State of Virginia such person's residence remains in this State until that person moves away from the State with the intention of relinquishing the residency in Virginia permanently and establishing a residency outside of the State.

The election laws are to be construed liberally in favor of the qualification of persons who desire to exercise their right of suffrage.

In my opinion, the local registrar does not have the authority to deny Mrs. Carroll's application for registration solely upon the ground that she lost her status as a resident in Virginia at the time she moved to Camp Allen, if Mrs. Carroll makes an affidavit to the effect that she is a resident of the State of Virginia and has been a resident for more than one year.

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ELECTIONS—Voting Machines—Write-In Ballots—Mark Must be Made in Appropriate Place. (285)

HONORABLE H. S. DABNEY
Member, Electoral Board of the City of Charlottesville

This is in reply to your letter of March 23, 1960, which reads as follows:

"I am a member of the Electoral Board of the City of Charlottesville and have before me the copy of your letter in reply to Mr. Turner with reference to write-in votes on voting machines. I wonder if you have referred to Section 24-307 of the Code of Virginia with reference to independent ballots under Chapter 12 of Voting Machines. That paragraph ends up by saying an independent ballot must be cast in its appropriate place on the machine or it shall be void and not counted. But nowhere states that it is necessary for a cross or mark to be made in connection with the write-in vote."

"I wonder if in light of this section that Section 24-252 is not done away with by this new section."

"This is not a particular problem with the election board in the primary as there are no write-in votes, but we did have quite a few problems in the last general election and would like to avoid it before this problem should arise again."

In my opinion a write-in vote under Chapter 12 of Title 24 relating to voting machines must be marked in the manner provided in §24-252 of the Code.

I wish to call attention to §24-315 of the Code, which is as follows:

"All of the election laws now in force, and not inconsistent with the provisions of this chapter, shall apply with full force and effect to elections in cities, towns and counties adopting and using voting machines. Nothing in this chapter shall be construed as prohibiting the use of a separate ballot for constitutional amendments and other public measures."

I think under this section the provisions of §24-252 apply.

ELECTIONS—Voting Rights of Naturalized Citizens—Capitation Taxes Must be Paid. (107)

HONORABLE JOHN C. WEBB
Member, House of Delegates

This is in reply to your letter of September 30, 1959, which reads as follows:

"Clarification is requested of the rights and duties of immigrants newly naturalized with respect to payment of poll taxes in order to be eligible to vote. The specific questions I am concerned with are as follows:

"1. Is a newly naturalized immigrant required to pay poll tax for his years of residence in Virginia prior to the time citizenship was granted to him?

"2. If your answer to Question No. 1 is 'No', then can an immigrant be allowed to vote in the year in which he is granted citizenship without

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the payment of poll tax for that year, as in the case of a Virginia resident who reaches the age of twenty-one years?

"3. If your answer to Question No. 1 is 'Yes', then does an immigrant not admitted to citizenship in this Country have the right to pay poll taxes in the State of Virginia?

"4. Would any statutory changes be required in order for the State Board of Elections to publish and distribute to immigrants seeking naturalization in United States District Courts located in the Commonwealth of Virginia information relative to registration, payment of poll taxes and voting in Virginia?"

With respect to question 1, under Section 58-49 of the Code, every resident of the State not less than twenty-one years of age, except those pensioned by the State for military service, is required to pay a State capitation tax of $1.50 per annum. This tax is levied against alien residents.

Under Section 20 of the Constitution in order to be eligible to register and vote, a recently naturalized citizen must have paid his State poll taxes as any other resident of Virginia—that is, such poll taxes as were assessed or assessable against him for the three years next preceding the year in which he offers to register and vote.

In view of the answer to your question 1, no answer to your question 2 is necessary.

With respect to question 3, under the Code Section 58-49 cited, there is a liability upon an immigrant who has not been admitted to citizenship for the payment of the capitation tax. Therefore, he not only has the right to pay such poll taxes, but the payment of the tax is required by statute.

With respect to question 4, the duties of the State Board of Elections are set forth in Chapter 3 of Title 24, and I can find nothing therein that would require the State Board of Elections to publish and distribute to immigrants the information relative to registration, payment of poll taxes and voting in Virginia. I think that the State Board of Elections would have the right to furnish such information under the present law.

ELECTIONS—Write-In Ballots—Procedure Where Voting Machines Used—Judges of Election to Determine Identity of Individual for Whom Vote is Cast. (256)

March 2, 1960

HONORABLE E. L. TURNER
Secretary, Charlottesville Electoral Board

This is in reply to your letter of March 1, 1960, which reads as follows:

"The City of Charlottesville installed voting machines approximately one year ago and has held two elections with their use.

"At our last election, we had a great number of write-in votes. Since the law does not appear too explicit regarding the use of voting machines, a number of questions arose.

"The first question was whether or not a check, cross or mark should be made in front of the name after writing it on the voting machine. The other problem was how to count the votes when various names were used for the same man. For example, a great many voters intended to write in the name of William R. Hill. Some of them wrote W. R. Hill, some Bill Hill, some W. Hill, etc."

With respect to your first question, I call attention to § 24-252 of the Code of Virginia, which reads as follows:

"It shall be lawful for any voter to place on the official ballot the name of any person in his own handwriting thereon and to vote for such other person for any office for which he may desire to vote and mark the same by a check or cross mark or a line immediately preceding the name inserted. Provided, however, that nothing contained in this section shall affect the operation of § 24-251 of the Code of Virginia. No ballot, with a name or names placed thereon in violation of this section, shall be counted for such person."

Under this section a write-in ballot is void unless it is marked by one of the methods prescribed therein. Therefore, whenever a person inserts in writing the name of his preference for a particular office, he must place before the name a check, cross or a line. No square or box need be placed in front of the name, but the placing of the square with the check, cross or line therein would not invalidate the ballot.

With respect to your second question, if the judges of the election, or a majority of the judges, are satisfied as to the identity of the person for whom the voter has voted, it is a valid vote.

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ELECTIONS—Write-Ins—Rubber Stamps—Marks—Misspelling. (123)

October 13, 1959

HONORABLE R. B. STEPHENSON, JR.
Commonwealth's Attorney for Alleghany County

This is in reply to your letter of October 9, 1959, relating to write-in votes in which you present the following questions:

"(1) Is a write-in candidate permitted to place rubber stamps at the polls thereby enabling a voter to stamp his name on the ballot?

"(2) If a name is written in, is the last name of the candidate sufficient or must the voter further identify the candidate by writing his initials or first name?

"(3) If the name which is written is misspelled, is it left to the judges of the election to determine what candidate the voter had in mind?

"(4) Is it necessary to place a cross mark or check mark to the left of the name that is written in, and if so, does this mark or check have to be enclosed in a square?

"(5) It is my information that there are a number of persons in this county having the same first and last name as certain announced write-in candidates. Are the judges of the election permitted to speculate as to what person the voter had in mind or must the name be written so as to clearly designate the candidate whose name is written in?"

The provisions with respect to write-in votes are contained in Section 24-252 of the Virginia Code. Under this section it will be noted that a rubber stamp may not be used by the voter, but he is required to insert, in his own handwriting, the name of the person for whom he is voting. It will be noted that under this section the voter, in addition to writing the name on the ballot, must mark the same by a check or a cross mark or a line immediately preceding the name inserted which, of course, would be on the left of such name. It is not
necessary that this check mark or cross mark or line be enclosed in a square. These statements, I believe, answer your questions (1) and (4).

With respect to your questions (2), (3) and (5), I am of the opinion that the judges of election must be satisfied as to the identity of the person for whom the voter has cast his ballot. This, of course, would be difficult if only the last name is written in and there is more than one person living in the county or district, as the case may be, who has the same surname. I do not feel that the misspelling of a name would necessarily invalidate the vote provided the judges are satisfied as to the identity of the candidate. I do not feel that the judges of elections should speculate as to the identity of a person who has been voted for in such manner, but they should have no doubt as for whom the voter intended to cast his ballot.

ENGINEERS—Professional Registration—Fee for Examination May Not be Pro-rated. (95)

HONORABLE TURNER N. BURTON, Director
Department of Professional and Occupational Registration

This is in response to your letter of September 8, 1959, which reads, in part, as follows:

"The Virginia State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors has been requested to permit its applicants applying for registration as Professional Engineers to pay their fees for professional registration in two parts—$5.00 to be paid with the filing of an application to sit for Part I of the examination, and the remainder of $20.00 to be paid when the applicant sits for Part II of the examination. "Part I of the professional engineering examination, according to the rules and regulations promulgated by the Board, is giving to all persons who have graduated from approved engineering schools and have received Bachelor of Science Degrees in Engineering, or, who have obtained the experience equivalent to the aforementioned degrees under the supervision of Certified Professional Engineers." "Part II of the examination is given to those applicants who have successfully passed Part I and who have acquired four years of experience in the field of engineering acceptable to the Board. The Board then issues Certificates of Professional Engineer to those applicants who have passed both parts of the examination. "The purpose of the request is to make it as easy as possible, from a financial standpoint, for graduates of our technical schools to sit for the first part of the examination, thereby inducing as many graduate students as possible to eventually qualify for certificates in the field of professional engineering."

The provisions of law relative to the State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors are found in Chapter 3 of Title 54 of the Code of Virginia. Section 54-30 of the Code provides that "* * * each applicant for a certificate to practice as a professional engineer * * * shall pay the secretary of the board a fee of twenty-five dollars for each examination * * *." Section 54-28 of the Code requires that the fee mentioned in § 54-30 be paid when a person makes application for a certificate to practice as a professional engineer. The payment of the fee mentioned in § 54-30
is, therefore, a prerequisite to the making and application to take the examination. Although § 54-25 of the Code authorizes the Board to make rules and regulations not inconsistent with the provisions of Chapter 3 of Title 54, I do not construe this section to authorize the Board to split the $25.00 fee into two separate payments. I am constrained to believe that any such rule or regulation passed by the Board would be inconsistent with the provisions of Chapter 3 of Title 54.

In view of the foregoing, I am of the opinion that the Board is not authorized to split the fee for the examination into two separate payments of $5.00 for Part I of the examination and $20.00 for Part II of the examination.

ENGINEERS—Use of Title "Engineer" in Advertising, etc.—Powers of Board. (202)

HONORABLE TURNER N. BURTON, Director Department of Professional and Occupational Registration

This is in reply to your letter of December 31, 1959, relating to Chapter 3, Title 54 of the Code of Virginia, the provisions of which are applicable to the licensing of architects, engineers and surveyors. Under this chapter no person may practice either of these professions unless he has met its requirements.

You point out that the State Board for the Examination and Certification of Architects, Professional Engineers and Land Surveyors, pursuant to its authority to promulgate and enforce rules and regulations under Section 54-25 of the Code, has issued certificates in certain special branches of engineering related to the general field of engineering set forth in Section 54-17, as follows:

- Aeronautical Engineering
- Agricultural Engineering
- Ceramic Engineering
- Coal Mining Engineering
- Heating and Air Conditioning Engineering
- Highway Engineering
- Industrial Engineering
- Naval Architecture
- Sanitary Engineering
- Structural Engineering

In addition, you make the following statement and present these questions:

"There are many individuals and companies throughout the State of Virginia who use in connection with their individual names or company designations the terms 'Engineer,' 'Engineers,' or 'Engineering.' These individuals and companies in most cases are manufacturers' representatives who sell mechanical equipment for buildings, such as heating equipment, air conditioning systems, etc. In some instances, individuals refer to themselves as 'Sales Engineer,' 'Space Engineer,' or 'Moving Engineer,' and many of the companies referred to use the words 'Engineer,' 'Engineers,' or 'Engineering' in the designations of their businesses. These individuals and companies, so far as we can determine, use these words for the purpose of gaining some amount of prestige among their clientele but do not practice the profession of engineering. The aforementioned individuals and owners of these companies are not holders of certificates issued by the Board.

"Your opinion relative to the following questions will be appreciated.
REPORT OF THE ATTORNEY GENERAL

"1. Do the provisions of Section 54-27, Code of Virginia, 1950, prohibit these individuals and companies from using in connection with their names and company designations the words 'Engineer,' 'Engineers,' and 'Engineering'?

"2. By the use of the words 'Engineer,' 'Engineers,' and 'Engineering' by these individuals and companies, does it convey the impression that these individuals and companies are practicing professional engineering or offering to practice professional engineering?

"3. Do the provisions of Chapter 3, Title 54, Code of Virginia, regulate the practice of professional engineering, or do they regulate the use of the designation professional engineer? In other words, could a non-registrant of the Board practice engineering when that person does not use in connection with his name the phrase 'professional engineering,' or does not otherwise assume, use or advertise any title or description tending to convey the impression that he is a 'professional engineer'?

Paragraph (2) of Section 54-17 of the Code defines "Professional engineer" as follows:

"(2) 'Professional engineer' shall be deemed to cover a civil engineer, engineer, mechanical engineer, electrical engineer, mining engineer, metallurgical engineer or a chemical engineer."

In my opinion, the powers of the Board to conduct examinations, issue certificates and otherwise supervise the practicing of engineering are limited to those types of engineering services included in the definition. Section 54-25 of the Code gives the Board certain powers to promulgate rules and regulations, but these powers are confined to the particular engineering professions set out in the definition.

With respect to questions (1) and (2), Section 54-27 of the Code provides:

"In order to safeguard life, health and property, any person practicing or offering to practice as an architect, a professional engineer or land surveyor in this State shall hereafter be required to submit reasonable evidence to the Board that he or she is qualified so to practice, and to be certified as herein provided. It shall be unlawful for any person to practice or to offer to practice the profession of engineering, architecture or land surveying, in this State, or to use in connection with his name, or otherwise assume, use or advertise any title or description tending to convey the impression that he is a professional engineer, architect or land surveyor, unless such person has been duly registered or is exempted under the provisions of this chapter."

This section prohibits a person who does not hold a certificate from using any words in connection with his efforts to attract clients which convey the impression that he is licensed as a professional engineer, an architect or a land surveyor as these terms are defined in § 54-17. In my opinion, the use of the word "engineer" without connecting it with a descriptive word, such as "sales," "space," or "moving," which are words you have used by way of illustration, would be in violation of the requirements of Section 54-27. The word "engineer" when used alone in connection with a business would, it would seem, have a tendency to cause the public to believe that the person using such word as a description or title of his profession was, in fact, engaged in the business of practicing professional engineering.

With respect to question (3), I am unable to find any language in Chapter 3, Title 54, which requires a person practicing or offering to practice "professional engineering" to use this title or phrase in connection with his profession. If a
person is the holder of a certificate issued under this chapter, he is entitled to practice or offer to practice his profession as shown on the certificate without advertising any title or description tending to convey the impression that he is a "professional engineer."

EXPENSES—Mileage—Counties—Reimbursement Not to Exceed Seven Cents Per Mile for Employees in Counties having County Manager Form of Government. (328)

Counties—Reimbursement—Mileage. (328)

HONORABLE ROBERT C. FITZGERALD
Commonwealth’s Attorney for Fairfax County

This is in reply to your letter of April 12, which reads as follows:

“Section 14-5.2 was amended to include counties with the executive form of government under the provision allowing the county to pay more than the 7 cents a mile allowance for automobile expenses for county employees on county businesses. This section applies to cases where the State bears no part of the cost. Evidently by oversight the following section of the Code was not amended which applies to cases where the State bears part of the costs. In view of the fact that Section 14-5.2 was amended to include counties such as Fairfax and since in any event the State will only pay its share of 7 cents per mile, would it be proper for the county to reimburse the travel allowance of the employees of such departments as the Sheriff’s Office, the Health Department and this office at a rate in excess of 7 cents per mile and be reimbursed by the State at its rate of 7 cents per mile.”

I assume that you refer to H. B. No. 334, which amended § 14-5.2 so as to make the section applicable to counties operating under a county executive form of government. We have not received the official Acts of the General Assembly as enacted, but I assume from your letter that this bill was passed without any change. I note that the bill does not contain an emergency clause and, therefore, it will not go into effect until June 28, 1960.

I feel that the question presented by you must be answered in the negative. Sections 14-5.2 and 14-5.3 of the Code relate to different situations. While it may have been the intention of the sponsors of the amendment to permit counties operating under an executive form of government to allow more than 7 cents per mile for travel in cases where the State bears a portion of the expenses, nevertheless that section of the Code which allows this privilege to counties operating under a county management form of government was not amended. Neither the title to H. B. No. 334 nor the substance of the bill in any way suggests that § 14-5.3 is intended to be amended.

FEDERAL PROPERTY—Jurisdiction—Revested in State When Land is Leased to Others by United States. (399)

HONORABLE ALFRED W. WHITEHURST
Commonwealth’s Attorney
City of Norfolk

This is in reply to your letter of June 13, 1960, in which you request an opinion
of this office with reference to the criminal jurisdiction of the courts of Norfolk City over a parcel of land upon which have been erected the "Allen Apartments."

In your letter you state that the apartment project is situated on a 34.09 acre parcel, part of a 508 acre tract acquired by the United States by condemnation in February, 1942. Later in 1942, a deed of cession, duly executed, was delivered to the United States ceding exclusive jurisdiction over the area pursuant to § 7-24(2), Code of Virginia. You add that the Secretary of the Navy accepted the cession of exclusive jurisdiction pursuant to "Section 354 of the Revised Statutes." You enclosed a copy of a lease agreement executed in June, 1952, whereby the United States demised to the Allen Apartments Corporation the 34.09 acre parcel for the purpose of constructing thereon a Wherry Housing project of approximately four hundred units. Allen Apartments Corporation is a private corporation organized for the purpose of constructing and operating this project for commercial profit.

Construction was financed by private capital under a note, made by Allen Apartments Corporation, secured by a deed of trust on the 75-year leasehold estate and insured by F.H.A. The Federal government furnishes no services whatever to the project, nor does it exercise any management control over the same. In short, full management and operating responsibility rests with the Allen Apartments Corporation, although the lease agreement provides that the lessee corporation shall lease all units of the project to such military and civilian personnel of the Armed Forces as are designated by the Commander of the Norfolk Naval Base, unless the Commander fails to designate such personnel, in which event the lessee may lease available units to persons other than armed forces personnel.

It is your contention that exclusive jurisdiction of this project was retroceded or became revested in the Commonwealth of Virginia when that portion of the 508 acre tract was leased to a private corporation with the right in such corporation to conduct thereon a private industry or business, such revesting being prescribed by § 7-24(6) of the Code of Virginia, the language of which was included in the 1942 deed of cession.

Section 7-24(6) reads as follows:

"(6) Every such deed as is provided for in this section shall reserve in the Commonwealth over all lands therein referred to the jurisdiction and power to serve civil and criminal process on such lands and in the event that the lands or any part thereof shall be sold or leased to any private individual, or any association or coporation, under the terms of which sale or lease the vendee or lessee shall have the right to conduct thereon any private industry or business, then the jurisdiction ceded to the United States over any such lands so sold or leased shall cease and determine, and thereafter the Commonwealth shall have all jurisdiction and power she would have had if no jurisdiction or power had been ceded to the United States. This provision, however, shall not apply to post exchanges, officers’ clubs and similar activities on lands acquired by the United States for purposes of national defense. It is further provided that the reservations provided for in this subsection shall remain effective even though they should be omitted from any deed executed pursuant to this section."

No copy of the deed of cession to which you refer is available to this office at the moment, however, assuming that the reservation required by § 7-24(6) is spelled out in the deed of cession, I agree with your contention and that of the Department of the Navy that the exclusive jurisdiction over the 34.09 acre portion of the 508 acre tract ceded to the United States by the deed of cession ceased and determined as of the effective date of the lease to Allen Apartments Corporation and the Commonwealth of Virginia now has "all jurisdiction and power she would have had if no jurisdiction or power had been ceded to the United States."
REPORT OF THE ATTORNEY GENERAL

FEES—Clerk of Court of Record—Copies of Exhibits Furnished Not Included in Flat Fee. (121)

October 13, 1959

HONORABLE C. T. GUIIN
Clerk, Circuit Court of Culpeper County

This is in reply to your letter of October 8, 1959, which reads as follows:

"Under Section 14-124 (a) and (b) this office has been making copies of exhibits to be filed in chancery causes, if same are in this office, for the $15.00 paid by the plaintiff when the suit was instituted, but recently have been advised that other clerk's offices charge for this service over and above the $15.00 fee paid when the suit is started.

"Please give me your opinion on this matter."

I enclose copy of an opinion rendered by this office on July 2, 1956, to the Clerk of Circuit Court of Chesterfield County, which relates to paragraphs (a) and (b) of Section 14-124 of the Code. As stated in the enclosed opinion, whenever a clerk elects to charge a flat fee of $15.00 in a chancery case, he is prohibited from charging any other fee for his services. However, in my opinion, the fee of $15.00 covers only such services as the clerk is required to render in connection with the chancery suit. When a clerk makes copies of records in his office to be filed as exhibits in a pending chancery cause, he is performing a service not contemplated by the code section under consideration. In my opinion, he would be entitled to the same fee for making copies of these records that would be chargeable if the copies were to be taken away from the clerk's office.

FIREARMS—Registration of Handguns—Board of Supervisors May Not Require in Certain Counties. (119)

October 12, 1959

HONORABLE WILLIAM C. CARTER
Commonwealth's Attorney for Cumberland County

This is in response to your letter of October 9, 1959, inquiring as to the authority of a county board of supervisors to enact an ordinance requiring the registration of all pistols and hand-guns in the county.

An examination of the pertinent provisions of State law pertaining to the subject do not appear to disclose the existence of authority that would permit a county board of supervisors to require registration of all pistols and hand-guns in the county. It is noted that Sections 59-141 through 59-144, Code of Virginia, authorize the imposition of a license tax on persons engaged in the business of selling pistols to the public, and may require such sellers to list the name and address of the purchaser, etc. Moreover, Chapter 297 of the 1944 Acts of Assembly provides for the requirement of a permit to purchase pistols in any county having a density of population of more than 1,000 per square mile. Reference is also made to Section 52-4, pertaining to machine gun registration.

In accordance with the foregoing, there appear to be no present provisions of law that would authorize an ordinance requiring registration of all such pistols and hand-guns in the county.
FISHERIES—Commission—No Authority to Damage or Destroy Public Oyster Grounds. (356)

May 19, 1960

HONORABLE MILTON T. HICKMAN, Chairman
Commission of Fisheries

This is in reply to the letter of May 11, 1960, from Mr. B. T. Gunter, Jr., in which my opinion is requested as to whether the Commission of Fisheries has authority to grant the Diamond Construction Company permission to deposit mud and sand on public oyster grounds.

While the General Assembly has vested in the Commission of Fisheries certain powers over public oyster grounds, I am of the opinion that such authority does not extend to the permissive deposit of foreign substances upon such grounds as may tend to damage or destroy the utility thereof for the purpose intended by the General Assembly of Virginia.

FISHERIES—“Federal Documented Boats”—Arrests and Seizures—Exception. (260)

March 7, 1960

HONORABLE HENRY D. GARNETT
Commonwealth’s Attorney for the City of Newport News

This is in reply to your recent letter in which you posed two questions:

“(1) Where a federal documented boat is involved, would a law enforcement officer of the Commonwealth of Virginia have a right to make an arrest for the violation of State Fisheries laws on the waters of the Commonwealth and remove the arrested party from the boat?

“(2) Do the law enforcement officers of the Commonwealth have a right where the State Fisheries laws have been violated to take a federal documented boat in tow and bring it into port where the boat is in Virginia waters?”

I take it that by “federal documented boat” you mean a boat which, by reason of its size, power, etc., is required to be registered and to carry certain documents issued by or under the supervision of the United States Coast Guard. An examination of the provisions of Title 28 of the Code of Virginia does not reveal any exception to the prohibitions of the statutes and the methods of enforcement thereof with respect to a “federal documented boat.”

I did note, however, that § 28-235, which is a part of Chapter 8, the “Potomac River Statutes,” provides that an officer enforcing the provisions of the two sections preceding § 28-235, may not “press” any vessel in carrying the United States mail to assist in making arrests or seizures of boats and equipment used in such violations. This is the only section I could find which made any exception whatsoever, and even this exception is not pertinent to your inquiry. In short, it is my opinion that the answers to both of your questions are in the affirmative.

FISHERIES—Oyster Inspectors—Must Account to Commission for Licenses Sold, Not for Tags. (329)

May 2, 1960

HONORABLE B. T. GUNTER, JR.,
Attorney for Commission of Fisheries

This is in reply to your letter of April 30, which reads as follows:
"The Commission of Fisheries has a problem which they requested me to state to you and ask that you furnish them an opinion. "The law provides that, in the case of certain taxes which are collected by the Commission of Fisheries, a metal tag be issued to the person paying the tax; to be attached to the boat so that it can be seen. These tags are delivered to each Inspector in quantities prior to the tax year. The tags are light and sometimes, being handled on the water, may be blown over board by the wind. The Inspector is charged with the entire number of tags at the time they are delivered to him. At the end of the year the Inspector has to account for all tags; he returns the tags not issued for which he receives credit, and remits the money for those tags issued. It has been customary, when the books of the Commission are audited, for the auditor to request the Commission, by proper resolution, to relieve the Inspector of liability for the tags which have been lost. The Commission requests you to give your opinion as to whether they have the right to relieve these Inspectors in case of those tags which are lost."

I assume you have reference to the tags required to be distributed pursuant to the provisions of Article 5 of Chapter 4 of Title 28. As I understand this matter, the inspectors issue receipts to the purchasers of licenses and at the same time furnish them with a tag to be displayed in accordance with the provisions of § 28-78. These tags, of course, have no value beyond their cost to the Commission. Whenever an oyster inspector accounts to the Commission for the tags that have been sold by him and the number sold and the tags being returned total less than the number delivered to the inspector, the Commission, of course, would have the right to relieve the inspector from any liability on account of those tags which have been lost. An inspector's accountability to the Commission should be limited to the amount of receipts from the sale of licenses.
suggested that you discuss the matter with the Judge as to which of the afore-
mentioned procedures appear to be applicable or appropriate in the situation
at bar.

GAME AND INLAND FISHERIES—Big Game Stamp Funds—May be Used
for Conservation of Wild Life—Access Roads Questionable. (108)

October 1, 1959

HONORABLE CHESTER J. STAFFORD
Commonwealth's Attorney for Giles County

This is in reply to your letter of September 29, 1959, which reads as follows:

"The Board of Supervisors of Giles County, Virginia, has requested
that I get an opinion from your office on the following:

"May funds from the surplus remaining at the end of the year from
the sale of license to hunt bear, deer or elk, as provided by Chapter 484
of the Acts of Assembly of 1950 be spent on improvements to roads,
not in the secondary system, to provide ingress and egress to the
National Forest lands and other areas used by game animals?"

The Act to which you refer provides that any surplus remaining at the end of
a year "shall remain in such fund and be used for the conservation of wild life
in the county under the direction of the board of supervisors." I am enclosing
copies of two opinions which relate to this statutory provision and a similar
provision found in Chapter 208 of the Acts of 1950. I note that one of these
opinions was furnished to you under date of February 19, 1957.

Whether or not the board of supervisors would have authority to expend the
surplus or any part thereof in the manner proposed depends solely upon whether
such expenditure would effect a conservation of wild life.

If the building of the means of ingress and egress to the national forest lands
and other areas used by game animals is for the purpose of furnishing a more
convenient access to these areas for persons to hunt on the property, then it
would seem that the money would not be spent for the purpose of conservation
of wild life, but for an opposite reason.

I think that the responsibility is upon the board of supervisors to decide
whether or not such an expenditure would be for the purpose permitted by
the statute.

GAME AND INLAND FISHERIES—Counties May Not Impose License Tax
On Non-Resident Hunters and Fishermen Without Statutory Authoriza-
tion. (159)

March 7, 1960

HONORABLE THURMAN BRITTS
Commonwealth's Attorney for Craig County

This is in reply to your letter of February 22, 1960, in which you state the
following:

"I have been asked by a member of the Board of Supervisors for
Craig County to request your opinion on whether or not it would be
constitutional for the County of Craig to levy a $5.00 tax on all hunters
and fishermen who are non-residents of Craig County. This tax would
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not take the place or do away with the present damage stamp but would be in addition to the same."

The "present damage stamp" was authorized by Chapter 361, Acts of Assembly, 1952, amending Chapter 294, Acts of Assembly, 1948. Without this statutory authority Craig County could not require any special stamp of any person to hunt bear or deer in the county. It follows that, without similar specific authority, the governing body of Craig County could not "levy a $5.00 tax on all hunters and fishermen who are non-residents of Craig County." I do not believe that, if such statutory authority is obtained, the fact that the amount of the fee for non-residents of Craig County was set at a higher figure than the amount of the fee for residents would make any such enabling legislation unconstitutional.

GAME AND INLAND FISHERIES—Hunting on State Secondary Highway—Effect of Posting by Adjoining Landowners. (210)

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth's Attorney for
Appomattox County

This is in reply to your letter of January 5, 1960, in which you state:

"I would appreciate it if you would give me the benefit of the opinion of your office on the following problem: Can a person lawfully stand in a State Secondary Road and hunt deer when the landowners on each side of the road have their property posted and do not want any hunting on their property?

"In other words, can a person be convicted of hunting on posted property where the landowners on both sides of a State Secondary Road have the property posted and have notified the particular individual not to hunt on their property?"

As you know, § 33-287 of the Code makes it unlawful for any person to shoot in or along any road, or within one hundred yards thereof, or in a street of any city or town, whether the town be incorporated or not. Further, § 18-147.1, as amended, prohibits the carrying or having in possession a loaded firearm while "on any part of a public highway" in counties which fall within three certain categories, and § 29-147.1, as amended, authorizes the governing bodies of counties falling within four certain categories, by ordinance, to prohibit hunting or attempting to hunt on or within one hundred yards of any highway which is a part of the State Highway System.

Your question deals specifically with whether a person may be convicted of "hunting on posted property," where the landowners on both sides of the road have posted their land and have given an individual notice that hunting is prohibited on their land. It appears that whether such an individual could be convicted of hunting on posted property will depend on whether the ownership of the fee in the secondary road on which he stands is in the landowners. If one or both of the landowners have merely granted an easement for the roadway to the county or Commonwealth and still retain fee simple title to the real estate, I am of the opinion that § 29-166 would be applicable, and that individuals so hunting could be convicted of a trespass on posted property.

On the other hand, it is doubtful whether the Commonwealth or a county through its ownership fee in a certain highway or roadway could be classified
as "landowner" under the provisions of §§ 29-165 and 29-166, as amended, of the Code of Virginia, so as to provide a basis for criminal proceedings under either of these sections. I am enclosing a copy of an opinion rendered to Honorable Downing L. Smith, Commonwealth's Attorney for Albemarle County, dated January 14, 1953, dealing with a similar question.

GAME AND INLAND FISHERIES—Licenses—Sale by Clerks and Agents—Commission May Prescribe that Agent Secure Affidavit of Applicant. (81)

HONORABLE WILLIAM C. CARTER
Commonwealth's Attorney for Cumberland County

September 3, 1959

This is in reply to your letter of August 24, 1959, in which you stated:

"An inquiry has been made to this office with regard to Section 29-63, 1950 Code of Virginia:

"'Evidence that applicant entitled to license.—The clerk or agent shall have authority to require any applicant to make affidavit or to furnish other satisfactory evidence that he is entitled to the license applied for before issuing the same.'

"Kindly inform me if, under this section, it is mandatory that all agents who are authorized to sell hunting and fishing licenses require applicants for such licenses to make an affidavit that the applicant is entitled to the license applied for."

Please be advised that §§ 29-62, 29-63, 29-64 and 29-65 of the Code should be read together in considering whether it is mandatory that agents for the sale of hunting, trapping and fishing licenses require an applicant for such licenses to furnish an affidavit that such applicant is entitled to the license applied for.

Section 29-63, which you quoted, is the enabling statute which gives to the clerk of court or the agent the authority to require any applicant to make affidavit or furnish satisfactory evidence of entitlement to the license applied for. Section 29-64 specifically states, in part:

"All applications shall be made in writing on blanks supplied by the Commission, setting forth the applicant's age, color of hair and eyes, height, post office address and such information as may be required by the particular application under the provisions of §§ 29-57 to 29-60; * * * ."

Further, § 29-65 provides that agents appointed by the Commission for the issuance and sale of the licenses provided for in Title 29 "shall be subject to the laws covering the issuance and sale of licenses and the regulations of the Commission as to the issuance and sale of permits."

Although § 29-63 does not make it mandatory that an agent shall require an applicant to make affidavit that he is entitled to the license applied for, I am advised that the Commission has made it a condition of the appointment and continuance in office of such agents that each agent shall require an applicant to make application in the form of an affidavit. I can find no statutory prohibition against the Commission's setting up such a requirement as a condition of appointment of the agents utilized by it to assist in the sale of licenses.
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GAME AND INLAND FISHERIES—Licenses—Second Conviction of Violation of Fish or Game Laws Requires Revocation of both Licenses for Twelve Month Period. (82)

HONORABLE MARTIN F. CLARK
Commonwealth’s Attorney for
Patrick County

This is in reply to your recent letter in which you asked for an interpretation of § 29-77 of the Code of Virginia, stating specifically:

“My question is whether or not a person who has been found guilty of fishing without a license, and permitting another to use his license to fish, which would constitute two violations under the provisions of the Inland Fish Laws, would also lose his hunting license or right to obtain a hunting license for a period of twelve months.”

Section 29-77 of the Code reads as follows:

“If any person be found guilty of violating any of the provisions of the hunting, trapping or inland fish laws a second time, the license issued to such person shall be revoked by the court trying the case and he shall not apply for a new license until twelve months succeeding date of conviction. If found hunting, trapping or fishing during such prohibited period, such person shall pay a fine of not less than fifty dollars nor more than one hundred dollars. Licenses revoked shall be sent to the Commission.”

This section, being of a penal nature, must be construed strictly against the Commonwealth. I am of the opinion that the language of the second sentence of the section, specifically: “If found hunting, trapping or fishing during such prohibited period, such person shall pay a fine * * *,” emphasizes the intent of the General Assembly to prohibit the exercise of the privileges of hunting, trapping or fishing for a period of twelve months succeeding the date of the second conviction of violation of the hunting, trapping or inland fishing laws. It follows that if an individual is possessed of both hunting and fishing licenses and suffers a second conviction of violation of the said laws, then both hunting and fishing licenses are revoked by the court trying the case and the individual is not eligible to apply for a new hunting license or for a new fishing license until the statutory period has run.

In the above connection, your attention is directed to the provisions of § 29-52 of the Code which provides certain exceptions to the license requirements. I am enclosing a copy of an opinion dated April 24, 1959 to Honorable Chester F. Phelps, Executive Director for the Commission of Game and Inland Fisheries, which, in part, explains the application of this latter section of the Code.

GAME AND INLAND FISHERIES—Special Deer Stamp—Grayson County—Disposition of Surplus Proceeds—Bounties on Foxes. (65)

HONORABLE JOE W. PARSONS
Clerk of Grayson County

This is in reply to your letter of August 19, 1959, which reads as follows:
"Chapter 291 of the 1955 Legislature page 344 provides for a special stamp for hunting deer in Grayson County, and further provides that the funds remaining from the sale of stamps can be used for the conservation of wild life.

"The Board of Supervisors would like to know whether or not some of this fund could be used for Bounties on Foxes, since it is reported that they destroy some of Game."

The Act to which you refer provides that any surplus remaining at the end of a license year shall remain in the special fund and "be used for the conservation of wild life in the county under the direction of the Board of Supervisors, and in cooperation with the Department of Game and Inland Fisheries."

It would seem from this language that any expenditure of the surplus can be used only in connection with a program for the conservation of wild life in which the Department of Game and Inland Fisheries is participating.

If the Board of Supervisors and the Department of Game and Inland Fisheries are of the opinion that the payment of bounties on foxes would be a means of conserving the wild life in the county, then, in my opinion, expenditures out of the surplus could be made for that purpose.

GARNISHMENTS—Fee and Commission for Service and Collection—Procedure to be Followed. (362)

May 25, 1960

HONORABLE A. SIDNEY FITCH, JR.
City Sergeant

I acknowledge your letter of May 18, which reads in part as follows:

"It is very important that I have at this time a ruling from your office in regard to the procedure in handling garnishees which were docketed in one court but processed by a sheriff or sergeant in another county or city.

"In order that you will be familiar with the question I have in mind, I would like to relate the following: In the Civil & Police Court at Clifton Forge a judgment and later a garnishee was issued and docketed in this court against the defendant, who at the present time is living and working in another city in this state. The clerk of the local court mailed to the sergeant of the other city the two (2) copies of the garnishee along with a check for $1.50 for service on the defendant and the employer of the defendant. The city sergeant in question upon the return date mailed direct to the judge of the court here his personal check along with the employer’s copy of the garnishee, and made payable to the plaintiff and deducting the 5% collection fee. I in turn wrote the sergeant, returning his check and stated that I must have the full amount of the garnishee payable to me, and that it is my responsibility to issue any check to the plaintiff for the amount due and handle the collection fee in my office on Comm. Form 17. The sergeant in question called me over long distance and stated that he was supposed to have the service fee and the 5% collection fee, and that he had handled these things for years, and that I had nothing to do with it, therefore, was returning his check payable to the plaintiff which I now have on my desk."

You state that the clerk of the municipal court mailed the process to the sergeant. I must assume that the writ of fieri facias, which was required to be issued as a
condition precedent to the issuance of the garnishee, as well as the summons in garnishment, were directed to the sergeant who served the garnishee and collected the debt. Sections 8-442 and 16.1-99 of the Code. Under authority of Section 8-448 of the Code, the garnishee apparently paid the amount of the judgment to the officer in whose hands the process had been placed for service. The officer also collected. I must assume, the statutory commission and made remittance of the amount collected for the judgment creditor to the court from which the execution and summons in garnishment were issued. This, in my judgment, was the proper procedure. Both processes were returnable by the officer to the court from which they were issued. Sections 8-442 and 16.1-99 of the Code.

Unless I am mistaken as to what occurred, I am of opinion that the officer to whom the process was sent acted in a proper manner.

GENERAL ASSEMBLY—Attorney Members—Continuances as a Matter of Right—Time Period Commences. (245)

February 22, 1960

HONORABLE W. CARRINGTON THOMPSON
Member, House of Delegates

This is in reply to your letter of February 18, 1960, which reads as follows:

"You are familiar with the provisions of Title 30, Section 5 of the Code of Virginia, as amended in 1952, granting attorneys who are members of the General Assembly a continuance as a matter of right on any pending litigation for a period ending thirty days after the adjournment of the General Assembly.

"Your official opinion is respectfully requested as to whether or not the thirty day period after adjournment commences after the practical adjournment proposed for March 12th or the sine die adjournment which usually occurs two weeks or more later."

Section 30-5 of the Code of Virginia provides:

"Any party to an action or proceeding in any court, commission or other tribunal having judicial or quasi judicial powers or jurisdiction, who is an officer or member of the General Assembly, or who has, prior to or during the session of the General Assembly, employed or retained to represent him in such action or proceeding an attorney who is an officer or member of the General Assembly, shall be entitled to a continuance as a matter of right during the period beginning fifteen days prior to the commencement of the session and ending thirty days after the adjournment thereof; and the failure of any court, commission or other tribunal to allow such continuance when requested so to do shall constitute reversible error."

The word "adjournment" contained in this section is also contained in Section 53 of the State Constitution and Section 1-12 of the Code. As used in the Constitution and Section 1-12, it is construed to mean the date on which the General Assembly adjourns sine die, which is the final adjournment at the end of the session, usually designated as the constructive session. Therefore, I am of opinion, that the thirty day period commences to run on the day after the adjournment of the General Assembly sine die. The computation of time shall be as prescribed in Section 1-13.3 of the Code.
This is in reply to your letter of October 8, 1959, which reads as follows:

"As a result of the institution of the Accelerated Tax Program, the tax revenues, to a large extent, reach us toward the end of the fiscal year. Because of these circumstances, we find it necessary to borrow, on a short-term basis, sums sufficient for the normal operation of the state government.

"The loans being made are under authority of Section 2-269, annotated Code of 1950. These loans are made from banks in Virginia.

"We have been requested to obtain from you an opinion that such notes signed by the Governor and Treasurer of Virginia are valid."

Section 2-269 of the Code of Virginia, to which you refer, reads as follows:

"The Governor shall have authority to raise, from time to time, by temporary loans, so much as may be needed to supply the wants at the State treasury, to be refunded by warrants of the Comptroller within twelve months from the time when such loans are made."

Under this statute, the Governor is authorized to borrow so much money as may be needed, by temporary loans "to supply the wants of the State treasury." Such a loan must be paid within twelve months from the time it is made.

This statute must be considered along with Sections 184, 184-a and 184-b of the Constitution.

Section 184 provides that:

"The General Assembly may contract debts to meet casual deficits in the revenue, to redeem a previous liability of the State, to suppress insurrection, repel invasion, or defend the State in time of war."

Section 184-a, which requires a majority vote of the people before the State may contract for a debt of the nature therein specified, expressly excepts those debts specifically authorized under Section 184.

Section 184-b of the Constitution provides that:

"No scrip, certificates, or other evidence of indebtedness, shall be issued, except for the transfer or redemption of stock previously issued, or for such debts as are expressly authorized in this Constitution."

These constitutional provisions are brought to your attention because they limit the application of the phrase "needed to supply the wants at the State treasury" to the purposes stated in Section 184.

In light of these constitutional provisions, loans under Section 2-269 of the Code may be made for the following purposes only:

1. To meet casual deficits in the revenue.
2. To redeem a previous liability of the State.
3. To suppress insurrection.
4. To repel invasion.
5. To defend the State in time of war.
Whether or not either of the five conditions set forth exists at any time is, in my opinion, a question to be determined by the Governor upon the basis of the facts presented to him by the treasury department of the State. The constitutional provision provides that "The General Assembly may contract debts" for the purposes stated therein. By that statute—Section 2-269 of the Code—the General Assembly has authorized the Governor to borrow money on behalf of the State whenever, in his judgment, one or more of the conditions contained in Section 184 of the Constitution occurs.

HIGHWAYS—Acquisition of Easements for Road Purposes—Where no Compensation of Landowner—Written Consent Required by Statute is not "Deed" Within Purview of § 15-709.1 of Code. (257)

March 4, 1960

HONORABLE EMORY L. CARLTON
Commonwealth's Attorney for Essex County

This is in reply to your letter of February 18, 1960, in which you refer to my previous letter of February 15, 1960, and now inquire if it is necessary for a county to comply with the requirements of Section 15-709 of the Code of Virginia when acquiring easements for road purposes pursuant to Section 33-145 of the Code.

In my letter to you under date of February 15, 1960, I advised that Section 15-709.1 of the Code, which requires deeds conveying real estate to a county to be approved by the Commonwealth's Attorney and accepted by the county, applies to all deeds purporting to convey an interest in real estate to the county, other than conveyances pursuant to the Virginia Land Subdivision Act.

Section 15-709 of the Code sets forth the requirements which must be complied with when a county purchases real estate or acquires title thereto. Essentially, such requirements consist of a contract in writing and an examination of title and approval thereof by an attorney appointed by the judge of the circuit court. The purpose of such requirements is to prevent loss of public funds by investment in property, the title to which is defective. (See McClanahan's Adm'r. v. N. & W. Ry. Co., 122 Va. 705.)

The provisions of Section 33-145 apply only when landowners along a proposed location of a county road desire no compensation for the necessary right of way. In such event such owners execute their written consent to give the right of way, and such written consent has the force and effect of a deed from the landowners.

It appears quite obvious from the foregoing that the County is not "purchasing real property or acquiring title thereto" as contemplated in Section 15-709 of the Code, when proceeding pursuant to Section 33-145 of the Code. Neither do I view the written consent of the affected landowners as a "deed" within the purview of Section 15-709.1 of the Code, even though such written consent may have the force and effect of a deed.

I am, therefore, of the opinion that it is unnecessary for a county to comply with the requirements of Sections 15-709 and 15-709.1 of the Code when proceeding pursuant to Section 33-145 of the Code to obtain written consent to utilize a proposed right of way for county road purposes.
REPORT OF THE ATTORNEY GENERAL

HIGHWAYS—Culverts—Installation of to Drain Secondary Road—State Highway Commission may Install at Request of County Board of Supervisors—No Duty so to Act. (11)

July 9, 1959

Mr. Joshua Pretlow
Commonwealth's Attorney for Nansemond County

This is in reply to your letter of July 3, 1959, in which you asked to be advised if there is any prohibition in the law to prevent the Virginia Department of Highways from carrying out a request of the Board of Supervisors of Nansemond County to install 150 feet of culvert in an open ditch which drains water from a secondary road.

As long as the cost of installing such culvert can be justified as a necessary highway maintenance expense, there is no legal prohibition against the Department of Highways installing such a drainage facility.

However, I am unable to concur in your view that there is a duty upon the Department of Highways to install such a culvert. Inasmuch as you state that the open ditch has existed for many years in the location specified on the sketch enclosed with your letter, I presume that the Commonwealth enjoys an easement which it acquired when the control and jurisdiction of the Secondary System of State Highways was placed in the State Highway Commission in 1932. It is conceivable that the drainage easement may have been lost, but I doubt that the condition mentioned in your letter would extinguish the easement or obligate the Commonwealth to install pipe in the ditch.

Assuming that the Commonwealth can sustain its claim to the easement, I am of the opinion that the determination as to whether a culvert should be installed in the open ditch in question is an administrative decision which the State Highway Commission has the power to make. The recommendation of the Board of Supervisors is entitled to great weight, but in the final analysis, the decision to expend State highway funds on the facility must be made by the State Highway Commission.

HIGHWAYS—Land Acquired by Condemnation—Not to be Taxed After Certificate of State Highway Commissioner is Recorded. (378)

June 9, 1960

Honorable G. Hugh Turner, Treasurer
Franklin County

This is in reply to your letter of June 7, 1960, in which you ask to be advised as to the taxing of real property which was taken for highway right of way in 1958, although the condemnation proceedings to ascertain just compensation therefor have not yet been concluded.

I presume that the State Highway Commissioner took possession of the land in question pursuant to Sections 33-70.1, et seq., Code of Virginia of 1950, as amended. Prior to the time of taking physical possession, the State Highway Commissioner filed with the Clerk of the Circuit Court a certificate representing a sum of money as provided in Section 33-70.3 of the Code. Upon the
recordation by the Clerk of such certificate, title to the land described therein vested in the Commonwealth pursuant to Section 33-70.4 of the Code.

Assuming the certificate of deposit was recorded prior to January 1, 1959, the title to the land therein described has become vested in the Commonwealth and should be removed from the land books.


HONORABLE H. H. HARRIS
State Highway Commissioner

June 22, 1960

This is in reply to your letter of June 3, 1960, in which you make several inquiries relating to the construction and maintenance of a boat launching ramp at a public landing in Middlesex County.

I presume for purposes of this letter that the public landing in question is a part of the secondary system of State highways, as defined in Section 33-44, Code of Virginia of 1950, as amended.

You first inquire as to whether the fact that the Department of Highways has jurisdiction over public landings is sufficient to authorize an expenditure of highway funds for a boat launching ramp at such a landing.

Article 4, of Chapter 1, Title 33 of the Code of Virginia of 1950, as amended, relating to the secondary system of State highways, manifestly vests the control, supervision and management of landings and wharves in the State Highway Commission. Within the framework of the Appropriation Act and the various applicable statutes, not here necessary to enumerate, the expenditure of public funds upon this system of highways is largely discretionary with the State Highway Commission. I am, therefore, of the opinion that the State Highway Commission may expend highway funds for a boat launching ramp if such a ramp is necessary or incidental to the adequate operation and function of the public landing.

You next inquire if there is any obligation upon the Department of Highways to build such ramps or expend funds for such construction.

If we assume as a premise that such launching ramps constitute a necessary or incidental adjunct to the adequate function of a public landing, I am of the opinion that the obligation to construct and maintain such ramps is mandatory only to the same degree as to any other facility or highway included in the secondary system of State highways. As pointed out above, the determination as to the expenditure of highway funds upon such system is largely discretionary with the State Highway Commission. I am aware of no provision in the law whereby the State Highway Commission could be compelled to construct such launching ramps.

You also inquire if the Department of Highways may delegate its duty to maintain such facilities, in the event they are to be constructed, to local governing bodies, private individuals, associations or corporations.

The construction, improvement and maintenance of the secondary system of State highways is a governmental function which is vested in the Department of Highways, under the supervision of the State Highway Commission and the State Highway Commissioner, by virtue of statute. Neither the powers nor obligations delegated by the General Assembly may be re-delegated to others, in the absence of statutory authority or necessary implication. The responsibility for the maintenance of the secondary system of State highways having been placed
HOLIDAYS—Power of Governor to Proclaim. (56)  

HONORABLE D. FRENCH SLAUGHTER, JR., Member  
House of Delegates  

August 14, 1959  

This is in reply to your letter of August 10, 1959, in which you asked to be advised as to the possibility of the Governor or State Highway Commission providing a holiday on September 3 and 4 for personnel of the Department of Highways in Culpeper County.  

The establishment of legal holidays is generally recognized as a prerogative of the legislative branch of government. Section 2-19, Code of Virginia of 1950 as amended, specifies the legal holidays for the State and expressly authorizes the Governor to appoint any other day as a legal holiday. I am aware of no instance in which such a holiday was declared for one section of the State or for specified government employees.  

A special legal holiday was declared for the County of Fauquier in commemoration of the Bicentennial Anniversary in the 1959 Special Session of the General Assembly by Chapter 8 of the Acts.  

While the State Highway Commissioner has no authority to declare a legal holiday for employees of the Department of Highways, I am aware of no legal prohibition against the Governor’s designation of a legal holiday for Culpeper County if he should determine to exercise the authority conferred by Section 2-19 of the Code.
the opinion that any such project that was under construction at the time the amendment became effective may qualify for State aid.

(2) In this question you request my interpretation of what constitutes "starting construction." The phrase "under construction" is used in the statute, and I am of the opinion it should be construed so as to accomplish the manifest purpose of the amendment which is to enlarge the scope of the beneficent provisions of the statute already existing. Therefore, I feel that if a hospital can show that it had let a contract for the erection of the building and the contractor had commenced actual work, such as excavating for the foundation, prior to the effective date of the amendment, the project would be deemed to be "under construction." I am aware of the recent case of McClung v. Henrico County, 200 Va. 870, which involved the question of what was meant by "started construction," in which the phrase was construed strictly, but this case involved a situation where a holder of a building permit was seeking to come within an exception to a zoning ordinance.

(3) A project is completed, it would seem, when the contractor has done all that is called for in the plans and specifications. It seems that completion would be necessary before final inspection and acceptance. Final or full settlement with the contractor and occupancy of the property would not necessarily have to occur.

(4) Under the provisions of the Act and Item 495-A of the Appropriation Act, the State's contribution to any one project may not exceed one-third of the total cost of the facility, or $125,000. In my opinion, the Act does not require the Council to allocate State funds so as to attain one-third of the cost of the project, or $125,000, whichever is the lesser. I think that the Council may determine to what extent State aid will be granted within the limits prescribed without regard to the principle of proration.

HOSPITALS—Nurse Training Facilities—What Buildings Qualify. (338)

See also—Nurses—

Honorable D. V. Chapman, Jr.
Advisory Council on Nursing Training

May 6, 1960

Reference is made to your letter of February 23, 1960, in which you requested my advice with respect to the following:

"During a meeting of the Advisory Council on Nursing Training, held in Richmond on February 19, 1960, action was deferred on 'tentative approval' of an application submitted by Portsmouth General Hospital, Portsmouth, Virginia, until a question of eligibility could be clarified.

"In accordance with action taken by the Council, I shall thank you to let us have your opinion as to whether or not State grants-in-aid may be allocated and paid to applicants for the provision of 'classroom,' and/or 'laboratory,' and/or 'other related facility,' meaning can any one or combination of these items be included in a building or structure which does not contain 'dormitory space,' with specific reference to Volume 1, Section 32-392-(d) as amended, Chapter 23, Title 32 of the Code of Virginia? If so, is there any special consideration that must be given to qualifications for approval of the application, such as an applicant having existing dormitory space and needing one or more of the other facilities to adequately equip its Nursing Training School?"
In such case, would be added facility, or facilities, have to be physically joined to the existing building housing the dormitory space?

By agreement with you, a reply was withheld pending the possibility that the General Assembly, which was then in session, might amend the statute in question. Section 32-392 of the Code was amended by Chapter 473, Acts of 1960, so that subsection (d) thereof now reads as follows:

"'Nurse training facility' means a dormitory, classroom, laboratory or other related facility under construction on April twenty-third, nineteen hundred and fifty-nine, or thereafter constructed, and used or to be used by a nursing school exclusively for housing and training student nurses in training to become nurses but shall not include a facility for training beyond such level."

You will note that by this amendment the phrase "in a building which includes dormitory space" was deleted.

In light of this amendment, I am of opinion that your first question must be answered in the affirmative.

The section, as amended, qualifies for a grant-in-aid "a dormitory, classroom, laboratory or other related facility under construction on April 23, 1959, or thereafter constructed and used or to be used, etc." Under this language, I am of opinion that an applicant is not required to have "existing dormitory space and needing one or more of the other facilities to adequately equip its Nursing Training School" in order to qualify.

The answer to your third question is in the negative.

INDUSTRIAL COMMISSION—Retirement—Appropriate Funds for Payment to Retired Members. (398)

HONORABLE SIDNEY C. DAY, JR.
Comptroller

June 22, 1960

This is in reply to your letter of June 17, which reads as follows:

"You requested that I write you concerning payment of retirement salary to two retired members of the Industrial Commission.

"I feel that even though the General Assembly of 1960 refused to amend Section 51-19 of the Code as I requested, it is the intention of the General Assembly that these retired members shall continue to receive the retirement salary provided by law.

"I therefore request your opinion as to whether or not I should make payments to these retired members as I do to retired judges, etc., under Section 51-25 of the Code. Should you rule that I may, and since the Industrial Commission is a special fund agency, with a balance of $674,268.00 in the fund on June 30, 1959, can the amount so paid during the next two years be transferred from this balance to the Retirement Fund Account?"

You will recall that in my opinion to you on April 24, 1959 (Report of Attorney General, 1958-59, p. 148), I expressed the view that the compensation
of retired members of the Industrial Commission should be paid out of the funds collected pursuant to the provisions of Title 65, as required by Section 51-19 of the Code. In as much as this section has not been amended, I am of opinion that you should continue to pay these retirement allowances in accordance with my previous opinion.

These payments should be made out of the funds appropriated in Item 116 of the Appropriation Act of 1960. I assume that during the biennium ending June 30, 1960, these payments were made out of Item 112-113 of the Appropriation Act of 1958.

I understand that the amount appropriated in Item 116 may not be sufficient to pay the anticipated expenses of the Industrial Commission as a whole. Therefore, I suggest that if a deficit is anticipated, the Governor's authorization should be obtained pursuant to Section 14 of the Appropriation Act, which is applicable due to the provisions of Section 65-127 of the Code.

INSANE AND MENTALLY ILL—County Courts—Commitment of Defendant for Mental Observation—Judge of County Court May Order Defendant Committed to State Hospital for Observation. (319)

April 21, 1960

HONORABLE PEYTON G. JEFFERSON
Substitute Judge
Lunenburg County Court

This is in reply to your letter of April 20, 1960, which reads as follows:

"Due to the illness of Bob Weaver I am acting as Substitute Judge of the County Court.

"I had a case before me today that it is difficult to determine whether it is a misdemeanor or felony. The defendant appears to be unsound mentally and the Commonwealth's Attorney and myself think that she should be committed to a state hospital for observation.

"It does not seem clear that the Judge of a County Court has the authority to commit a defendant to a state hospital for observation. The Circuit Court under the statute clearly has such authority but we are unable to determine if it is broad enough to include the Judge of a County Court.

"I thought possibly you had had this question before you and will appreciate your advising me if under these circumstances the Judge of the County Court has such authority."

This office has ruled that § 19-202 of the Code applies only to courts of record. However, § 37-211 of the Code, which is applicable to juvenile and trial justice courts, prescribes an additional method by which courts may commit persons who are before the court for any purpose other than inquiry into their mental condition. Such commitments are temporary only and for the purpose of observation, following which a report should be made to the court as to the mental condition of the person who has been committed.

Under § 16.1-30, a judge of a county court has the authority of a trial justice in connection with the commitment of insane persons.

I am of opinion, therefore, that you have authority to commit the person in question to a State hospital for observation as to her mental condition.
REPORT OF THE ATTORNEY GENERAL

JUDGES—Courts Not of Record—Substitute County Judge Paid Per Diem From Appropriation for Criminal Charges. (66) August 21, 1959

HONORABLE LESLIE L. MASON, JR.
Substitute County Judge of Powhatan County

This is in reply to your letter of August 19, 1959, in which you state as follows:

"At the suggestion of Judge J. G. Jefferson, Jr., I would appreciate your office advising me the proper method for me to receive compensation as substitute county judge of Powhatan County."

"I have occasion to sit for the following reasons, (1) when the regular judge is ill, on vacation, or disqualified; (2) on matters necessary to be heard in Powhatan on other than regular court days, (our Court sits only on the first and third Wednesday and our regular county judge presiding in Amelia County sometimes causes right much inconvenience.)"

"I will appreciate your advising me the source and rate of my compensation for serving as outlined above."

Section 16.1-50 of the Code provides as follows:

"The salaries of all judges, associate judges, clerks, deputy clerks and clerical assistants of all county courts except those in counties having a density of population in excess of five thousand per square mile shall be fixed and paid as provided in article 5 (§ 14-50 et seq.) of chapter 1 of Title 14. Each substitute judge of any such court shall receive for his services a per diem compensation equivalent to one twenty-fifth of the monthly installment of the salary of the judge of his court. The salaries of all judges, associate judges, substitute judges, clerks, deputy clerks and clerical assistants of county courts in any county having a density of population in excess of five thousand per square mile shall be fixed and paid by the governing body of the county for which such court is established; and all such judicial salaries shall be fixed without regard to article 5 (§ 14-50 et seq.) of chapter 1 of Title 14, and shall not be diminished during the term of office of the judge."

You will note that this section provides that a substitute judge shall receive a per diem compensation equivalent to one twenty-fifth of the monthly installment of the salary of the judge of the county court.

Under the provisions of Section 14-53 of the Code it is provided that the compensation shall be paid by the State out of the appropriations in the general Appropriation Act for criminal charges.

JUDGES—Office Space—Duty of City to Provide for Substitute Judge. (384)
Public Officers—City Attorney—Duty to Render Opinions. (384)
Public Offices—Use of—Not Proper to Use for Private Law Office. (384)

HONORABLE J. J. JEWETT
Member, House of Delegates

This is in reply to your letter of June 9, 1960, in which you request the opinion of this office on the following questions:

"(1) Whether or not there is a mandatory duty incumbent upon the
Council of the City of Colonial Heights to furnish a substitute judge of a municipal court with an office in the municipal building and whether or not if such an office is furnished would it be proper for such substitute judge to use such office for the private practice of law.

“(2) Whether or not it was the constitutional or official duty of the City Attorney of Colonial Heights to render an opinion to the above question after having been requested to do so by a member of the City Council.”

The new Colonial Heights Charter of 1960 (Acts of Assembly, 1960, Chapter 213), which, being emergency legislation, has been in effect since March 9, of this year, does not provide for an office to be furnished by the City for the use of the Municipal Judge. Section 19.7 of the Act (Charter) provides that the Municipal Judge “shall hold his court at such place and time as may be prescribed by the council” and, if he is unable to act, the Substitute Municipal Judge shall discharge the duties of the Municipal Judge; while § 20.10 reads as follows:

“It shall be the duty of the city to provide a suitable courtroom for the municipal judge of the city and suitable offices for the commissioner of revenue, city treasurer, city sergeant, commonwealth attorney and city attorney.”

Nor does the Colonial Heights Charter of 1950 (Acts of Assembly, 1950, Chapter 144) make it the duty of the City Council to furnish an office for the Municipal Judge. Reference to the earlier charter is necessitated by the provisions of § 20.26 of the new Charter, which prescribes that until September 1, 1960, “the powers and duties of the Mayor and the City Council, in addition to such powers and duties set forth in this Charter,” shall be as outlined in the Charter of 1950, “and the same are incorporated herein by reference.”

However, § 16.1-61 of the Code of Virginia, the general law pertaining to municipal courts not of record, specifies:

“Each city having a municipal court shall provide a suitable courtroom and office for the court, its judge and clerk, and shall provide all necessary furniture, equipment, books, stationery and supplies for the efficient operation of the court. Such equipment and supplies shall remain the property of the city, and shall be under the control of the clerk subject to the supervision of the judge.”

This Code section controls where there is no conflict between it and the Charter of the City. It follows that the City Council of Colonial Heights should furnish an office “for the court, its judge and clerk.”

The apparent intent of this legislation is that the office provided for the city judge, necessarily is required only “for efficient operation of the court.” Section 19.9 of the Colonial Heights Charter of 1960 authorizes substitute municipal judges to act for the Municipal Judge “when, from any cause, said municipal judge is unable to perform the duties of his office, and clothes the substitute with the powers and authority of his principal. See, also § 19.7. I am of the opinion, therefore, that a substitute judge is entitled to use the judge’s office when actually performing his duties as such substitute.

I do not believe that either the Charter or the general law imposes upon the City the duty of providing a separate office for a substitute judge of a municipal court, nor do I feel it to be proper that either judicial officer should utilize city-owned or -leased office space or supplies for carrying on his private practice of the law.

Consideration of your second question likewise entailed examination of both the old and new charters of the City of Colonial Heights. There is no question
but that both § 30 of the Charter of 1950 and § 10.3 of the Charter of 1960 required the City Attorney to furnish a member of the City Council, upon request, a written opinion upon any question of law pertinent to the official powers and duties of such member or of the Council as a whole. A member of the City Council is an elective officer of the City. Constitution of Virginia, Section 122. Section 10.3 of the new Charter specifies that the City Attorney shall be "the legal advisor" of the Council, the City Manager, etc., "in all matters affecting the interests of the City, and shall, upon request, furnish a written opinion of any question of law involving their respective official powers and duties."

To construe the language quoted above as limiting the right of an individual member of the City Council to request an official opinion on a question of law involving either the best interests of the City or the duties of such member would be tantamount to requiring a councilman who doubted the legality of an action proposed to be taken by the majority to hire private counsel to advise him, and through him the other members of council. I am of the opinion that such was not the intent of the General Assembly of Virginia in adopting the new Charter of the City of Colonial Heights and that it was the duty of the City Attorney of Colonial Heights to render an opinion on your first question when requested so to do by a member of the City Council.

JUDGES—Salaries—Cities May Increase to Amount Deemed Proper. (332)

Honorable J. Randolph Larrick
City Solicitor for City of Winchester

May 3, 1960

This is in reply to your letter of May 2, in which you refer to Section 25 of the Charter of the city of Winchester, which relates to the judge of the corporation court of the city of Winchester and in which you present the following question:

"We are presently paying the judge of our Corporation Court, who resides in Warren County, Virginia, $560.00 a year. This sum is paid to the state and it is the desire of the council to raise this salary if this can be done in view of Section 14-43 through Section 14-48 of the 1950 Code of Virginia. I would appreciate your giving me the benefit of your opinion in particular reference to Section 14-45 and Section 14-48."

Item 14 of the Appropriation Act of the 1958 Session of the General Assembly appropriated $1120.00 for the payment of the salary of the judge of the corporation court of the city of Winchester. Therefore, the provision with respect to the payment of a salary of $800.00 per year as contained in Section 25 of the Charter has become inoperative as a result of the action of the General Assembly in fixing his salary at $1120.00 per year.

Under the provisions of Section 14-43, the city of Winchester is required to reimburse the State for one-half of the salary, which I note is being done.

Section 14-48 of the Code authorizes any city to increase the salary of its corporation, city and circuit court judges, or any one or more of them, as it may deem proper. Such increase, however, shall be paid wholly by the city and may not be diminished during the term of office of the judge whose salary is so increased. Under this provision, the council of the city of Winchester, in my opinion, is authorized to increase the salary of the judge of the corporation court of Winchester in such amount as it may deem proper.
JUSTICES OF PEACE—Marriages—No Statutory Authority to Perform—May be Appointed by Court. (182)

HONORABLE ARTHUR L. HUGHEY
Justice of the Peace-Elect

This is in response to your letter of December 8, 1959, in which you state that, on November 3, 1959, you were elected to the office of Justice of the Peace for the Tunstall Magisterial District of Pittsylvania County, and that you will take office on January 1, 1960. You request general information relative to the duties of a justice of the peace. I regret that there is no handbook or pamphlet available which describes the duties of a justice of the peace. I would suggest that you examine Title 39 of the Code of Virginia which contains the general provisions of law relative to your office. In addition, Chapter 5 of Title 19 of the Code contains the provisions of law relative to arrests, bail, commitments and recognizances and should be carefully read.

You state further that you would like to qualify to perform marriages and you request information relative to the procedure to be followed. A justice of the peace is not vested with the authority to perform marriages by virtue of his office. The Judge of the Circuit Court of Pittsylvania County is authorized by § 20-25 of the Code to appoint residents of the County to celebrate the rites of marriage, and I am of the opinion that a justice of the peace is eligible for such appointment.

JUSTICES OF PEACE—May Also be Judge of a Court Not of Record. (377)

HONORABLE J. J. JEWETT
Member, House of Delegates

This is in reply to your letter of June 8, 1960, in which you posed two questions at the request of Mr. E. Webster Andrews, candidate for election to the Council of the City of Colonial Heights. The questions are as follows:

1. Whether or not a person may at the same time hold the office of judge, associate judge or substitute judge of a court not of record and the office of justice of peace.

2. Whether or not a person who holds both the office of a justice of the peace and the office of a substitute or associate judge may issue or write a warrant in the capacity of a justice of the peace and later serve or act as a substitute or film and and later serve or act as judge on the trial of such person on the warrant or as an attorney to represent or defend such a person.

With reference to your first question, I have examined Chapter 213, Acts of Assembly, 1960, which provided a new charter for the City of Colonial Heights and, as emergency legislation, became effective on March 9, 1960, as well as the general law pertinent to the inquiry. I find that the new Charter does not specify whether the offices of substitute judge of the municipal court and justice of the peace for the city shall be incompatible. In this event, the general law controls. Section 16.1-22 of the Code of Virginia provides:

"A substitute judge of a court not of record shall be eligible to hold the office of justice of the peace, but on any day on which he acts as
judge of such court all fees accruing to him on that day, whether in his capacity as justice of the peace or as substitute judge, shall be accounted for and disposed of by him as if all such fees accrued to him in his capacity as judge of the court or to the court itself, as the case may be."

It follows that the answer to your first question is in the affirmative.

As to your second question, I have found no statutory prohibition in either the general law or in the Charter which would prohibit an individual holding both offices from issuing a warrant and later trying the case as municipal judge. It may be argued that the difference in function between the two offices—on the one hand, to issue a warrant after finding probable cause to believe a crime to have been committed, and on the other hand, to determine whether the prosecution has proved the accused guilty beyond a reasonable doubt, both sides having been heard—may result in prejudice to the accused. However, historically, both justices of the peace and judge of courts not of record have tried defendants upon warrants which they had issued.

The second aspect of this question, whether the dual office holder should serve as attorney to represent or defend a person, against whom he has issued a warrant as justice of the peace, in the court of which he is substitute judge, necessarily involves a question of ethics and a consideration of § 19.9 of Chapter 213, Acts, 1960, the new Charter. The first sentence of this section reads:

("Substitute and Assistant judges may be appointed by the judge of the Circuit Court and may only represent clients in the courts of said city as allowed and permitted by the judge of the circuit court having jurisdiction over said city by appropriate order entered."

I am not advised of the terms and conditions set out in the orders of the circuit court having appropriate jurisdiction and am unable to state categorically whether such conduct is prohibited thereby. The general law dealing with cases in which judges of courts not of record are disqualified is found in § 16.1-24, as amended, of the Code, which may or may not be incorporated in the circuit court orders.

The Legal Ethics Committee of the Virginia State Bar, on March 29, 1949, rendered its opinion on the question of whether a lawyer who was also a justice of the peace could represent in court a man against whom he had issued a warrant. The opinion printed in Virginia State Bar—Opinions, at page 18, states:

"It is unethical and improper for a lawyer-justice of the peace to issue a warrant and then represent either the plaintiff or defendant in the particular litigation resulting from the issuance of the warrant."

This opinion was clarified later, specifically, on January 19, 1952, (Opinions, page 30), by the Legal Ethics Committee with the statement:

"It is the opinion of your Committee that a Lawyer-Justice of the Peace has to make his own choice as to whether under any particular circumstances he is going to assume the status of lawyer or Justice of the Peace, and if, as a Justice of the Peace, he issues a warrant, either criminal or civil, he should not thereafter represent any party in an action, either civil or criminal, which results from the same subject matter."

Sections 54-48 et seq. of the Code of Virginia and the Rules of the Supreme Court of Appeals provide certain sanctions against unprofessional conduct by members of the Virginia State Bar.
REPORT OF THE ATTORNEY GENERAL

JUSTICES OF PEACE—May Not Also Hold Office of Registrar. (179)

HONORABLE VALENTINE W. SOUTHALL
County Judge, Amelia County

This is in reply to your letter of December 9, 1959, which reads as follows:

“Our County General Registrar is also a Justice of the Peace. He has recently been informed that, under Section 16-1, he cannot hold both offices and that the acceptance or holding of both offices vacates his commission as Justice of the Peace. For the record, as I recall, although this probably has no bearing on the question, he was first the Registrar and then received the appointment as Justice of the Peace. This Justice of the Peace desires a prompt ruling from your office on the question presented. If he cannot hold both offices, then he desires to submit his resignation as Registrar to the Board of Supervisors on Monday, December 14th, 1959. If you can give him your opinion by that time he will be most appreciative.

“As I see it, there is no incompatibility between the two offices. At least, there has been none in this County so far. However, my view might not be totally unprejudiced as, should this man resign as Registrar, I know the difficulty the County will experience in getting a satisfactory and qualified replacement for him. The Justice of the Peace office is much the more remunerative of the two and, naturally, if he is forced to make a choice, he will choose the Justice of the Peace job.”

Section 16-1 of the Code to which you refer was repealed at the time Title 16.1 of the Code was adopted. I wish to call attention to Sections 24-53 and 24-66 of the Code. Under these sections it is clear that a registrar may not hold the office of justice of the peace and registrar at the same time. You do not state whether or not this person was a candidate in the recent November election for the office of justice of the peace.

Under Section 24-66 he was not eligible to be a candidate for that office and he is not eligible to hold the office if he was elected.

There have been several opinions rendered by this office in connection with this point, and I enclose herewith copies of the following opinions:


Under the terms of Section 24-53 of the Code, since you state that this person was registrar at the time he was appointed justice of the peace, his tenure of office as registrar was automatically terminated at the time he accepted the office of justice of the peace. Under these Code sections it would seem that the legality of this person holding either of these offices at the present time, under the circumstances existing, is extremely doubtful.

JUVENILE AND DOMESTIC RELATIONS COURTS—Clerks—Bail Bonds—Clerk of Such Court May Act as Bondsman. (277)

HONORABLE ROBERT F. HOLT, Clerk
Juvenile and Domestic Relations Court of City of Roanoke

This will reply to your letter of March 17, 1960, in which you inquire
whether or not it would be permissible for the Clerk of the Juvenile and Domestic Relations Court of the City of Roanoke to act (1) as an underwriter of bail bonds for prisoners incarcerated by the Juvenile and Domestic Relations Court or (2) as an underwriter of bail bonds for prisoners incarcerated by courts other than the Juvenile and Domestic Relations Court.

I have been unable to discover any provision of Virginia law which expressly prohibits the clerk of a juvenile and domestic relations court from acting as an underwriter of bail bonds in either of the situations you present. Although this office has previously ruled that one who fixes bail for those accused of violations of law may not with propriety also serve as a professional bondsman, Report of the Attorney General (1956-1957) p. 143, it does not appear that the above cited opinion would be applicable to either of the situations stated in your communication, since clerks of juvenile and domestic relations courts are not authorized to admit persons to bail except in those limited instances embraced within the provisions of Section 16.1-197 of the Virginia Code. In light of the inapplicability of Section 16.1-197 of the Virginia Code to the particular circumstances outlined in your letter, I am of the opinion that the Clerk of the Juvenile and Domestic Relations Court of the City of Roanoke would not be prohibited from acting as an underwriter of bail bonds in such instances.

JUVENILE AND DOMESTIC RELATIONS COURTS—Mentally Defective Children—Commitment—Jurisdiction. (222)

February 1, 1960

HONORABLE G. GARLAND WILSON
Commonwealth's Attorney for the City of Radford

I am in receipt of your letter of January 26, 1960, in which you call my attention to certain provisions of Sections 16.1-158 and 16.1-178 of the Virginia Code and inquire whether or not the juvenile and domestic relations court of a city "may commit mentally ill children who reside within one mile of such City to a State Hospital for treatment".

In pertinent part, Sections 16.1-158 and 16.1-178 of the Code of Virginia (1950) as amended prescribe:

"Sec. 16.1-158.—The judges of the juvenile court elected or appointed under this law shall be conservators of the peace within the corporate limits of the cities and the boundaries of the counties for which they are respectively chosen and within one mile beyond the corporate limits of such cities. Except as hereinafter provided, each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, and within one mile beyond the corporate limits of said city, concurrent jurisdiction with the juvenile court or courts of the adjoining county or counties over all cases, matters and proceedings involving:

* * *

"(2) The commitment of a mentally defective or mentally disordered child who is within the purview of this law. Such commitment shall be in accordance with the provisions of chapters 3 (Sec. 37-61 et seq.), 6 (Sec. 37-154 et seq.) and 7 (Sec. 37-176 et seq.) of Title 37 of the Code. (Italics supplied).

"Sec. 16.1-178.—If the court shall find that the child or minor is
within the purview of this law it shall so decree and by order duly entered proceed as follows:

• • • •

"(6) Commit the child or minor, if adjudged mentally defective, to a mental institution, in accordance with the provisions of the law."

(Italics supplied).

The above quoted provisions of the statutes under consideration prescribe the jurisdiction and procedures of juvenile and domestic relations courts with respect to cases involving mentally defective or mentally disordered children who are "within the purview" of the Juvenile and Domestic Relations Court Law. Code of Virginia (1950) as amended, Title 16.1, Chapter 8, Article 1. The provisions in question authorize the commitment of mentally ill children by the various juvenile and domestic relations courts of the Commonwealth only when such children are within the purview of the Juvenile and Domestic Relations Court Law. While I am of the opinion that it would be permissible for the juvenile and domestic relations court of a city to commit a mentally ill child, who resides within one mile of the corporate limits of such city, to a State hospital if the child is within the purview of Title 16.1, Chapter 8, I do not believe that the statutes in question confer jurisdiction upon such courts to commit mentally ill children who are not otherwise within the purview of the Juvenile and Domestic Relations Court Law.

You also inquire "whether or not the person, as mentioned in the first paragraph of Section 16.1-190 means a child, minor or adult, and whether the jurisdiction of the same extends for one mile beyond such city".

The initial paragraph of Section 16.1-190 of the Code of Virginia (1950) as amended provides:

"The court may cause any person within its jurisdiction under the provisions of this law to be examined and treated by a physician, or psychiatrist, or examined by a clinical psychologist; and upon the written recommendation of the physician or psychiatrist the court shall have the power to send any such person to a State mental hospital for observation."

I am of the opinion that the above quoted language embraces any child, minor or adult who is within the jurisdiction of a juvenile and domestic relations court under the provisions of the Juvenile and Domestic Relations Court Law and confers the prescribed powers upon the juvenile and domestic relations court of a city with respect to any person who resides within one mile of the corporate limits of such city.

Finally, I am of the opinion that the General Assembly may, by appropriate legislation, authorize courts of the various cities of the Commonwealth to exercise concurrent jurisdiction within one mile of the corporate limits of such cities for the purpose of conducting commitment proceedings for persons whose commitment is now provided for in Section 37-61 et seq. of the Virginia Code.

JUVENILES—Compulsory School Attendance—Juvenile Court may Require as Condition of Probation. (142)

HONORABLE C. VINCENT HARDWICK, Judge
Juvenile and Domestic Relations Court of Essex County

This will reply to your letter of October 24, 1959, in which you point out that
"school attendance is no longer compulsory in our state" and present for consideration the following inquiries:

"A child or minor is brought before the Juvenile Court on some charge, other than non-attendance at school, and the child is found not innocent. May the judge, as one of the conditions of probation, require the attendance of such child at school, if he feels that it is for the best interests of the child?

"Also, if such a condition of probation was imposed prior to the repeal of the Compulsory Attendance Law, did the repeal of such law nullify the order of the judge in so far as it pertained to compulsory school attendance?"

Pertinent with respect to these questions is Section 16.1-178 of the Code of Virginia (1950) as amended, which in part prescribes:

"If the court shall find that the child or minor is within the purview of this law it shall so decree and by order duly entered proceed as follows:

"(1) Take custody and place the child or minor on probation, under such conditions as the court shall determine. * * *

I am constrained to believe that the language of the above quoted statute authorizes the judge of a juvenile and domestic relations court to place a child or minor on probation under any conditions which are reasonable, are in the best interest of the child and are not contrary to law. In the case you present, it appears from your communication that the condition under consideration is reasonable and in the best interest of the child, and I am not aware of any provision of Virginia law which forbids a person having custody of a child to require such child's attendance at school. I am, therefore, of the opinion that your initial inquiry should be answered in the affirmative.

With respect to your second question, the repeal of the Compulsory Attendance Law by the General Assembly (Acts of Assembly, Extra Session, 1959, Chapter 2) relieved parents, guardians and other persons having control, charge or custody of a child from the legal obligation of sending such child to a public or private school, or having such child taught by a qualified tutor or teacher. The repeal in question did not diminish the right of such persons voluntarily to require a child in their custody to attend school, nor did it forbid such persons—under threat of penal sanctions—to require school attendance by children in their custody. Similarly, in my opinion, the repeal of the Compulsory Attendance Law did not diminish the power conferred upon the judge of a juvenile and domestic relations court by the provisions of Section 16.1-178(1) of the Virginia Code, and I do not believe, therefore, that such repeal would nullify an order of a juvenile and domestic relations court which was entered prior to the repeal in question and conditioned the probation of a child or minor upon his attending school.

JUVENILES—Warrants—Issuance Not Contemplated by Statute—General Practice of Courts. (201)

HONORABLE HORACE T. MORRISON
Commonwealth's Attorney for King George County

January 5, 1960

This will reply to your letter of December 28, 1959, in which you call my attention to Section 16.1-158 of the Virginia Code, which prescribes the jurisdic-
tion of the various juvenile and domestic relations courts of the Commonwealth, and to Section 16.1-164 of the Virginia Code, which provides:

"When the court receives reliable information that any child or minor is within the purview of this law or subject to the jurisdiction of the court hereunder, except for a traffic violation or violation of the game and fish law, the court shall require an investigation which may include the physical, mental and social conditions and personality of the child or minor and the facts and circumstances surrounding the violation of the law. The court may then proceed informally and make such adjustment as is practicable without a petition or may authorize a petition to be filed by any person, and if any such person does not file a petition a probation officer or a police officer shall file it; but nothing herein shall affect the right of any person to file a petition if he so desires. In case of violation of the traffic laws or the game and fish laws the court may proceed on any summons issued without the filing of a petition. In case of violation of the traffic laws such summons may be issued by the officer investigating the violation in the same manner as provided by law for adults."

You state that, in recent months, certain justices of the peace have issued criminal warrants in cases cognizable by juvenile and domestic relations courts, and you request my opinion upon the propriety of such procedure.

In this connection, I concur in the view expressed in your communication that the above quoted statute does not contemplate the issuance of criminal warrants in cases within the jurisdiction of juvenile and domestic relations courts. The statute in question declares that, upon receipt of the reliable information therein prescribed, such courts shall require an investigation and may then proceed to adjust the matter informally or may authorize the filing of a petition. It thus appears that Section 16.1-164 contemplates that proceedings in juvenile and domestic relations courts shall be formally initiated by the filing of a petition rather than by the issuance of a criminal warrant.

However, I do not believe that the issuance of a criminal warrant by a justice of the peace in such cases would be fatal to subsequent proceedings in a juvenile and domestic relations court. I am informed that, in such instances, it is the general practice of the judges of such courts to require the investigation specified in Section 16.1-164, and then to dismiss the warrant and make an informal adjustment of the matter or cause a petition to be filed as prescribed by the statute under consideration. I find nothing in the applicable statutes which indicates that the above described method of disposition of such cases by the juvenile and domestic relations courts would not be appropriate.

JUVENILES—Welfare and Institutions—Minors Committed to Custody—Procedure When Parole is Violated. (340)

HONORABLE RICHARD W. COPELAND, Director
Department of Welfare and Institutions

May 6, 1960

This will reply to your letter of recent date, in which you call my attention to Section 16.1-210 of the Virginia Code and request an opinion concerning the procedure contemplated by this statute "when a determination is made by a court of competent jurisdiction that (a) child has violated the terms of his parole."
Section 16.1-210 of the Code of Virginia (1950) as amended, provides:

"When the Department returns a child or minor who has been committed to its custody to a local community for supervision, the Director may return the child or minor to either the local juvenile and domestic relations court or to the local department of public welfare of the community. The agency to which the child or minor is returned for supervision shall accept responsibility for this service. When a child or minor is so paroled for local supervision, he shall be deemed to be still in the custody of the Department."

"The local supervising agency shall furnish such child or minor a written statement of the conditions of his parole and shall instruct him regarding the same. In the event it is determined by a court of competent jurisdiction that the child or minor has violated the terms of his parole, the child or minor may then be returned to the Department."

Manifestly, no specific procedural requirements applicable to the situation you present are enunciated in the above quoted statute, nor are any such requirements set out in the other provisions of Article 5 of the Juvenile and Domestic Relations Court Law relating to probation services. In the absence of any required statutory procedure applicable in such instances, I believe it would be advisable for an official of the local supervising agency to notify the court, in writing, that a child or minor has violated the terms of his parole, citing the specific violation involved. Thereafter, it would be appropriate for the court to notify the child or minor in question of the alleged violation and apprise such child or minor, as well as the supervising agency, of the date set by the court for a hearing upon the matter. If, after the hearing, the court should determine that the child or minor has violated the terms of his parole, I believe the court should enter a brief order to that effect, stating the particular in which the terms of the parole have been violated. After the entry of such an order, the child or minor may then be returned to the Department of Welfare and Institutions in accordance with the terminal provision of the statute under consideration.

LABOR LAWS—Women Taxi Drivers Not Subject to Hours of Work Limitation. (93)

HONORABLE EDMOND M. BOGGS
Commissioner
Department of Labor and Industry

September 18, 1959

This is in reply to your letter of September 16, 1959, which reads as follows:

"According to Title 40, Section 4 of the Code of Virginia, paragraphs 4 and 5, the Commissioner of Labor, his assistants and inspectors shall visit and inspect at reasonable hours, as often as practicable, and shall enforce the provisions of this title, in factories, mercantile, mills, workshops, and commercial institutions in the State where goods, wares or merchandise are manufactured, purchased or sold, at wholesale or retail.

"Title 40, Section 34 of the Code, regulation of hours of work of women, provides in part that females shall be employed not more than 9 hours in any one day of 24 hours, nor more than 48 hours in any one week. This Section of the law refers to employment in factories,
workshops, laundries, restaurants, mercantile and manufacturing establishments.

"Your opinion will be appreciated on this question:

"'Would a bus, or taxi, used in public transportation be classified as a commercial institution or as a workshop and would female drivers of such vehicles be subject to regulation of hours of work provided in Title 40, Section 34?'

"It has come to my attention that female bus drivers are being employed at this present time for as many as 56 to 60 hours a week."

Section 40-34 of the Code reads as follows:

"No female shall be employed, suffered or permitted to work in any factory, workshop, laundry, restaurant, mercantile or manufacturing establishment in this State more than nine hours in any one day of twenty-four hours without an unbroken rest period of ten consecutive hours, nor more than forty-eight hours in any one week. All contracts for the employment of any female in any factory, workshop, laundry, restaurant, mercantile or manufacturing establishment to work more than nine hours in any one day of twenty-four hours without an unbroken rest period of ten consecutive hours, or more than forty-eight hours in any one week, shall be deemed to be void.

"Nothing in this section shall be construed to prohibit an employee from working after an unbroken rest period of eight hours in connection with shift changes, occurring not oftener than once in any work week."

In my opinion, a taxicab business would not come within any of the classifications prohibited by this section. I have considered the cases relating to what constitutes a workshop within the meaning of the labor statutes, and I can find no case that would indicate that this type of business would come within that classification.

As to whether or not a bus or taxi used in public transportation would be classified as a commercial institution or a workshop, as these terms are used in Section 40-4 of the Code, it is noted that in that section only those types of workshops and commercial institutions "where goods, wares or merchandise are manufactured, purchased or sold, at wholesale or retail" are included.

It is clear that this section does not apply to taxicabs.

LIBRARIES—Regional—Unused Appropriations do Not Revert. (411)

HONORABLE G. M. WEEMS
Treasurer of Hanover County

This is in reply to your letter of June 23, 1960, which reads in part as follows:

"I understand that your office has made a ruling to the effect that regional library funds are agency funds in the hands of the county treasurer and not subject to reversion at the end of the fiscal year on a theory that once having been appropriated the amounts are no longer subject to the control of the Board of Supervisors. The Pamunkey Regional Library Funds are derived from King William County, the Town of West Point and Hanover County, as well as State and Federal sources."
I do not believe that this office has made a ruling as stated in your letter, but I am of the opinion that any unused portion of the appropriation remaining at the end of the fiscal year is still subject to control of the Board of Trustees of the Regional Library and does not revert to the control of the Board of Supervisors. This is because Section 42-10 of the Code of Virginia, *inter alia*, provides:

“All funds appropriated or contributed for library purposes shall constitute a separate fund and shall not be used for any but library purposes.”

In light of this provision, when an appropriation is made by the Board of Supervisors for such library purposes, it is “expended” within the meaning of that term as used in the terminal sentence of Section 58-839, and does not revert and become available for re-appropriation under this section.

Furthermore, Section 42-9, in referring to the board of trustees, states, *inter alia*:

“They shall have control of the expenditures of all monies credited to the county free library fund or the regional free library fund.”

I might add that the board of supervisors can take into consideration these unused funds in determining the appropriations necessary to meet “the minimum public library standards of the State Library Board” for the ensuing year.

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LIBRARIES—Regional, Withdrawal From—Statutory Method for Withdrawal Not Exclusive. (326)

April 29, 1960

HONORABLE RANDOLPH W. CHURCH

State Librarian

I have considered your request for an opinion upon the question raised by a letter from Junius W. Pulley, Chairman of the Walter Cecil Rawls Library & Museum, dated April 27, 1960, to your office, which question is as follows:

“You will note from the proposed contract and will remember from statements made by some members of the Nansemond Board that there is a time limit fixed in the contract for the expiration of the connection with the Library. Yesterday I overlooked calling your attention to Section 42-7 and asked if this section overrides any agreement to terminate the contract.”

§ 42-7 of the Code to which Mr. Pulley refers, is as follows:

“The withdrawal of any county or city from a regional library contract may be effected by petition and vote in the manner prescribed in § 42-4, and the county or city shall be entitled to a division of property in the same proportion as expenses were shared.”

I do not think that the above section of the Code is exclusive as to the method by which a county or a city may withdraw from a regional library contract. I think that it is within the power of the contracting parties to limit the duration of the contract by the terms thereof.
LOTTERIES—Chance Essential Element—Prize Based on Most Frequent Attendance Not Lottery. (389)

HONORABLE R. NORRIS BLOXOM
Commonwealth's Attorney for
Accomack County

This will reply to your letter of June 15, 1960, in which you inquire whether or not a certain promotional program would contravene the anti-lottery laws of Virginia. (Code of Virginia (1950) as amended, Section 18-301, et seq.) As outlined in your communication, the venture in question would be conducted in the following manner:

"X Corporation operates a Drive-In Theatre in Accomack County. The corporation plans to advertise and give away as a prize an automobile at the conclusion of its season, which will be October 15, 1960. This automobile will be given to the person who attends the Theatre the most times and brings the most people to the theatre between July 1, 1960, and October 15, 1960."

In conformity with the opinion of the Supreme Court of Appeals of Virginia in Maughs v. Porter, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. However, in the situation you present, it does not appear that the ultimate winner of the automobile to be awarded will be selected by chance, but will be selected upon the basis of his attendance at the theatre in question and his industry in bringing others to the theatre during the specified contest period. I am, therefore, of the opinion that one of the constituent elements of a lottery will be lacking in the enterprise under consideration and that such enterprise would not constitute a lottery under Virginia law.

LOTTERIES—Consideration—Application of Code Section 18-301.1. (351)

HONORABLE KOSSEN GREGORY
Member House of Delegates

This will reply to your letter of May 11, 1960, in which you inquire whether or not a certain enterprise would constitute a lottery under "the Virginia anti-lottery law as it was recently amended and becomes effective in June." As outlined in your communication, the venture in question would be conducted in the following manner:

"A canned food item is offered for sale which contains a label and the rules require that the label or a facsimile thereof be returned by the entrant with his name and address on the back thereof to a central office of the food company and that winners will be determined by drawing names from the entries submitted."

The constituent elements of a lottery are prize, chance and consideration. Maughs v. Porter, 157 Va. 415. Section 18-301 of the Virginia Code, inter alia, prohibits any person from promoting or being concerned in the managing or drawing of a lottery or raffle for money or other thing of value. At its regular
session of 1960, the General Assembly amended the Code of Virginia by adding thereto a new section numbered 18-301.1, which statute prescribes:

"In any prosecution under the preceding section, (Section 18-301) no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith."

It would appear that no charge is made to or paid by any person in connection with the execution and return of the label or facsimile mentioned in your communication. Moreover, in view of the fact that a facsimile of the label in question may be returned to the central office of the promoter, it does not appear that any purchase is required of an entrant in connection with the return of the facsimile as a condition of his eligibility to receive a prize. In light of the provisions of Section 18-301.1 of the Virginia Code, I am of the opinion that no consideration would be deemed to have passed or been given in the conduct of the activity concerning which you inquire and that such activity, therefore, would not constitute a lottery under the anti-lottery laws of Virginia as recently amended.

LOTTERIES—Consideration—Participation in Game Without Charge or Purchase does not constitute. (367)

Honorable S. F. Landreth
Member of Senate

I am in receipt of your letter of May 23, 1960, in which you inquire whether or not a certain promotional program utilized by Radio Station WBOB constitutes a lottery under Virginia law.

From the collateral documents submitted with your communication, it appears that the program in question is styled "Zingo" and is conducted in the following manner:

"'Zingo' is a radio program broadcast by this Station six days a week offering a cash prize of five dollars ($5.00) per game to the winner.

"Any listener is eligible to participate in the game. All he has to do is pick up game sheets from one of the sponsors, without obligation of making any purchases or paying for the game sheets in any way.

"The Station sells commercial time to the various sponsors and distributes game sheets each week in advance for the coming week so that the listeners may go to their place of business or to the Radio Station and pick up their 'Zingo' sheets for the week without obligation or consideration. Different colored game sheets are played each week.

"At the regular schedules game time, the announcer informs the listeners what color sheets are in play for the particular game, and also the sponsors for that particular day, and where they can pick up the game sheets absolutely free. He then begins the game by calling numbers furnished by Azrael Productions, Baltimore, Maryland. The first player having every number on his game sheet called by the announcer telephones the Station and the winning card is verified by use of a tele-
phone beeper so that all listeners are informed at all times of what is happening. The winner then brings or mails the game sheet to the station for final verification, and a check is issued.

"In the event a winner is not declared on any particular day, the amount of cash for that day is added to the next day's game. Over a period of sixty some odd weeks of airing the program, this has happened only four or five times."

In conformity with the opinion of the Supreme Court of Appeals of Virginia in *Maughs v. Porter*, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. Consistent with our former rulings, I am of the opinion that the enterprise under consideration would constitute a lottery under existing Virginia law. See, Section 18-301, Code of Virginia (1950) as amended; Report of the Attorney General (1957-1958) p. 169; (1956-1957) p. 161; (1955-1956) p. 123.

However, at its recent regular session, the General Assembly amended the Code of Virginia by adding thereto a new section, numbered 18-301.1, which provides:

"In any prosecution under the preceding section, (Section 18-301) no consideration shall be deemed to have passed or been given because of any person's attendance upon the premises of another; his execution, mailing or delivery of an entry blank; his answering of questions, verbally or in writing; his witnessing of a demonstration or other proceeding; or any one or more thereof, where no charge is made to, paid by, or any purchase required of him in connection therewith."

The above quoted enactment, which will appear as Chapter 226 of the Acts of Assembly of 1960, will become effective on June 27, 1960. Since it appears that no charge is made to or paid by an entrant in connection with the execution and return of the game sheet employed in the "Zingo" program, and that no purchase is required of an entrant as a condition of his eligibility to receive a prize, I am of the opinion that no consideration within the meaning of Section 18-301.1 of the Virginia Code would be deemed to have passed or been given in the conduct of the activity concerning which you inquire, and that such activity would not constitute a lottery under the anti-lottery laws of Virginia as recently amended.

**LOTTERIES—Contest Guessing Number of Straws in Broom—Facsimile Not Readily Available For Study. (69)**

August 21, 1959

HONORABLE T. GRAY HADDON
Attorney for the Commonwealth for the City of Richmond

This will reply to your letter of August 14, in which you inquire whether or not a certain sales promotional program, which one of the national oil companies proposes to conduct in the Richmond area, would constitute a lottery under Section 18-301 of the Virginia Code. As outlined in your communication, the program in question will be conducted in the following manner:

"Each oil station participating in this contest will exhibit prominently an enlarged drawing of a whisk-broom arranged so that the viewer will see the brush end of the broom. The end of each straw will appear as a dot and the contestant will be asked to estimate the number
of dots (representing straws). A prize will be awarded at each station each week to the contestant whose estimate is closest to the correct number. In the event of ties for the weekly prize the earliest entry will win except that if there are ties on the same day duplicate prizes will be awarded. The contest will continue for six weeks with the picture (and the number of dots) being changed each week. At the conclusion of the contest a grand prize will be awarded the contestant whose answer was closest to the correct count throughout the contest. In the event of ties for the grand prize, the tying contestants will be required to complete a statement concerning the oil company’s product which will be judged according to originality, sincerity and aptness of thought.

“Although there will be several thousand dots on the end of the pictured whisk-broom, it will be possible for a contestant to actually count the dots. It will also be possible for a contestant to compute the area of the dots, count the number of dots in a small area (e.g. one square inch) and then calculate the total number of dots. Thus, by the exercise of sufficient skill in counting or calculating a contestant could arrive at the correct or winning number of dots.”

As you are aware, this office has frequently ruled—in conformity with the opinion of the Supreme Court of Appeals of Virginia in Maugs v. Porter, 157 Va. 415—that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. I fully concur in your observation that the elements of prize and consideration are present in the contest under discussion and that the critical inquiry presented in this instance is whether or not the element of chance exists to the degree necessary to bring the activity in question within the definition of a lottery.

I have examined the rough sketch of the whisk broom which will be used in the instant contest and note that the “brush end” thereof consists of a profusion of almost microscopic dots, which you state in your letter to be “several thousand” in number. If each entry blank contained a reproduction of this drawing—so that it would be possible for participants in the contest to take an entry blank from one of the sponsor’s oil stations and actually count all of the dots, or count those in a specific area and then calculate the total, I would be inclined to agree that “by the exercise of sufficient skill in counting or calculating a contestant could arrive at the correct or winning number of dots”. However, as the only drawings available to prospective contestants will be those exhibited at each participating oil station, I do not believe that the contest presents prospective entrants with any genuine opportunity to exercise such skill as the counting or calculating of the number of dots may entail. As a practical matter, contestants will only be able to guess at the total number of dots on the drawing of the whisk broom. While the question is not entirely free from doubt, I am constrained to believe that this circumstance constitutes an element of chance sufficient to bring the contest in question within the scope of the lottery laws of Virginia.

LOTTERIES—“Prize-O-Rama”—Contest Not Lottery. (67)

HONORABLE C. E. CUDDY
Commonwealth’s Attorney for the City of Roanoke

August 21, 1959

This will reply to your letters of August 4 and August 11, 1959, in which you inquire whether or not certain Prize-O-Rama contests proposed to be conducted in the city of Roanoke by the Esso Standard Oil Company would be
REPORT OF THE ATTORNEY GENERAL


From your letters and the brochure accompanying your initial communication, it appears that the venture in question would be operated in the manner outlined below. The contest would be operated in Central and Western Virginia. Esso service stations in that area would have available for contest entrants a supply of official entry blanks, each containing a picture of an assortment of various articles of merchandise and a description of each item. Entry blanks may be obtained upon request, and prospective entrants need not purchase any of the sponsor's products in order to participate in the contest. Contestants estimate or determine the total dollars-and-cents value (exclusive of taxes) of the items pictured and described on the blank, enter such total in a space provided on the blank and mail the form to an address in New York City designated by the sponsor. The value of each individual article of merchandise will be the manufacturer's suggested retail price prevailing throughout the area covered by the contest. In any instance in which the manufacturer's suggested retail price for any article is not the same throughout the contest area, the contest rules and materials will specify that the manufacturer's suggested retail price in the city of Roanoke is the price to be used by contestants.

At the close of each contest period, prizes will be awarded on the basis of the estimate or determination closest to the actual total dollars-and-cents value of the items pictured and described on the contest blank. In case of ties, contestants will be required to complete a twenty-five word statement relating to the purchase of the sponsor's products, the ultimate winner to be decided after such statements have been judged on the basis of originality, sincerity and aptness of thought by an independent organization supervising the Prize-O-Rama contest.

In conformity with the opinion of the Supreme Court of Appeals of Virginia in Maughs v. Porter, 157 Va. 415, this office has frequently ruled that a particular activity constitutes a lottery when the elements of prize, chance and consideration combine. As the elements of prize and consideration are present in the contest under consideration, cf., Report of the Attorney General (1955-56) p. 123, the critical question presented in this instance is whether or not the element of chance exists to the degree necessary to bring the activity in question within the definition of a lottery.

If I have correctly assessed the material submitted, the manufacturer's suggested retail price for each article pictured on the blank will be the same throughout the contest area, or throughout the city of Roanoke if the manufacturer's suggested retail price for that city is designated by the sponsor as the price to be used by contestants in making their estimates or determinations. If each item pictured on the entry blank is described in sufficient detail to enable a contestant to ascertain such price correctly merely by reading the description from the entry form to one who deals in such articles, it would appear that anyone willing to spend sufficient time and make the necessary inquiries could establish the exact total value of the articles described, and thus completely eliminate the element of chance. The circumstance that some contestant might guess the exact total value rather than compute such total upon the basis of information gathered by inquiry would not, in my opinion, inject a sufficient element of chance into the contest to bring it in conflict with the lottery laws of Virginia. The method provided for determining the ultimate winner in case of ties would appear to fall within the scope of previous opinions of this office ruling that slogan contests are not in violation of the lottery laws of the State. See, Report of the Attorney General (1954-55) p. 115.

While the matter in question is by no means free from doubt, I am constrained to believe—subject to the conditions stated above—that the contest under consideration would not constitute a lottery under Virginia law.
HONORABLE VALENTINE W. SOUTHALL, Judge
County Court of Amelia County

I am in receipt of your letter of May 6, 1960, in which you call my attention to certain provisions of Sections 37-62, 37-63 and 37-64 of the Virginia Code and request an opinion concerning the "full part played by a county judge in lunacy and inebriacy hearings."

Sections 37-62, 37-63 and 37-64 of the Code of Virginia (1950) as amended, respectively provide:

"Sec. 37-62.—The judge or trial justice mentioned in Sec. 37-61 or the special justice mentioned in Sec. 37-61.2 shall summon two licensed and reputable physicians. One of the physicians shall, when practicable, be the physician of the person who is alleged to be mentally-ill, epileptic, mentally-deficient, or inebriate, and neither shall in any manner be related to him or have an interest in his estate. The judge and the two physicians, or the justice or special justice and the two physicians, shall constitute a commission to inquire whether such person is mentally-ill, epileptic, mentally-deficient or inebriate and a suitable subject for a hospital or colony for the care and treatment of mentally-ill, epileptic, mentally-deficient, or inebriate persons, and for that purpose the judge, justice or special justice shall summon witnesses to testify under oath as to the condition of such person." (Italics supplied).

"Sec. 37-63.—The physicians shall, in the presence of the judge or justice, if practicable, by personal examination of such person, and by inquiry, satisfy themselves and the judge or justice that the person being examined shows sufficient evidence of being mentally-ill, mentally-deficient, epileptic, or inebriate to warrant his commitment to a State hospital for observation." (Italics supplied).

"Sec. 37-64.—If the two physicians summoned under Sec. 37-62 do not agree, a third physician shall be summoned. If the person being examined request it, there shall also be summoned a physician of his choice, who shall sit with and be a member of the commission; provided, that the fee and expense of such physician shall be paid by the person being examined."

It is significant, I believe, that Section 37-62 declares that the judge and the two specified physicians, or the justice or special justice and such physicians, shall constitute the commission contemplated by the legislation under consideration. The commission is not composed merely of the two physicians. Consistent with this declaration is that provision of Section 37-63 which requires the physicians on the commission to satisfy the judge or justice, as well as themselves, that the person being examined shows sufficient evidence of incapacity sufficient to warrant his commitment to a State hospital. Also consistent with these provisions is the language of Section 37-71 of the Virginia Code which, in pertinent part, prescribes:

"If the commission decides that the person shows sufficient evidence of being mentally-ill, mentally-deficient, epileptic or inebriate and should be confined in a hospital or colony, and ascertains that he is a legal resident of this State, then the judge or justice shall order such person to be delivered to the care of the sheriff of the county or sergeant of the city or town to be kept and cared for by him in the nearest..."
State hospital or colony or special ward or room in the Medical College of Virginia or University of Virginia hospitals, or in a general hospital approved by the State Hospital Board for such purpose, or in some other convenient institution likewise to be approved by the State Hospital Board, until such person is conveyed to a hospital or colony, or otherwise discharged.” (Italics supplied).

In light of the language italicized above, it is manifest that (1) an individual may be committed to a State hospital or colony only if the commission—of which, as previously indicated, the judge or justice is a member—decides that such person shall be so confined and (2) only the judge or justice is authorized to order such commitment. I do not believe that the Legislature contemplated that the judge or justice in question would be required to order an individual confined in a State hospital or colony, unless such judge or justice had been previously satisfied—as prescribed in Section 37-63—that the person in question exhibited sufficient evidence of incapacity to warrant commitment. I am, therefore, of the opinion that no commitment may or should be made unless the judge or justice on the commission is personally satisfied of the incapacity of the individual under examination.

With respect to your additional inquiry, I am of the opinion that the provisions of Section 37-62.1 of the Code of Virginia (1950) are applicable to proceedings for the commitment of inebriates pursuant to Title 37, Chapter 3, Article 1, and that an attorney should be appointed by the judge if the individual whose commitment is sought is not represented by counsel.

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MARRIAGE—By Trans-Ocean Telephone—Valid When Statutory Requirements Complied With. (304)

HONORABLE GARNETT S. MOORE
Member of the House of Delegates

This is in reply to your letter of April 1, 1960, which reads as follows:

“We have received an inquiry from a serviceman regarding the validity of his marriage under Virginia law. The circumstances are as follows:

“The young man was stationed in France while serving in the Air Force. He went through a form of marriage ceremony with a French citizen, and lived with her for a short time as husband and wife. After his return to the United States, he was informed by the Air Force that he was not legally married and could not have the girl brought to this country as his wife. She was then expecting their child.

“The young man obtained a marriage license in Virginia under provisions of § 20-16, Code of Virginia of 1950, by giving the proper information under oath. In addition, there was presented to the Clerk an affidavit of the girl taken before a person qualified to administer oaths. Both parties were of proper age and met all requirements for marriage to each other under Virginia law.

“The proper serological tests were given to the young man in Virginia and the young lady in France. The physicians signed statements that there was no evidence of syphilis in either case. The reports were submitted to the State Department of Health.

“The Clerk issued the license. A properly qualified minister then performed the marriage ceremony, in the presence of the young man and
numerous witnesses, and while the young lady was speaking and listening to the marriage ceremony by means of a transatlantic telephone connection.

"The minister returned the license and necessary certificates to the clerk, indicating the time and place of the marriage celebration.

"Some three months later, the Air Force has denied the validity of the marriage under Virginia law. The young man is affected in two ways; he cannot get the girl admitted to this country as his wife, and he is being ordered to return certain allotment money. The couple now have a child, raising the question of legitimacy.

"We will appreciate greatly your opinion concerning the validity of this marriage."

The statutes of this State—Chapter 2, Title 20 of the Virginia Code—prescribe the requirements of a valid marriage in this State. Whenever a license has been issued and returned to the Clerk's office from which it was issued with a certificate of the minister as required by § 20-17 of the Code, and registered and filed pursuant to §§ 20-18 and 20-20 of the Code, the record of such marriage "shall be prima facie evidence in all courts of this Commonwealth of the facts stated therein."

As pointed out by former Attorney General Staples, one of the essentials of a common law marriage was that the parties must be in the presence of each other. I enclose copy of the opinion rendered by Attorney General Staples, which is published in the Report of this office for 1942-43, at page 142. Judge Staples relied on a statement contained in 18 R.C.L., which is as follows:

"The two essentials of a valid marriage at common law are capacity and mutual consent, and it is well settled that under the common law the marriage relation may be formed by words of present assent, per verbe de praesenti, and without the interposition of any person lawfully authorized to solemnize marriages, or to join persons in marriage. To constitute marriage per verba de praesenti, the parties must be in the presence of each other when the agreement is entered into, but it need not be made in the presence of a witness, though without witnesses it may be difficult to establish it. The parties may express the agreement by parol, they may signify it by whatever ceremony their whim or their taste or their religious belief may select; it is the agreement itself, and not the form in which it is couched, which constitutes the contract; and the words used or the ceremony performed are mere evidence of a present intention and agreement of the parties."

I am unable to find any Virginia authority which makes any statement as to the necessity of the parties being in the presence of each other in order to be validly married under statutory procedure requiring a license, etc., such as is set out in the Virginia Code.

On the record as filed in the Clerk's office of your county, the marriage of the parties named in the license and the certificate of the officiating minister is binding, it would seem, until a court of competent jurisdiction holds to the contrary.

The Virginia statute does not provide that both the parties must be in the presence of the officiating minister when the marriage is solemnized. The statute provides in § 20-13: "Every marriage in this State shall be under a license and solemnized in the manner herein provided."

The statute does not provide any details of the manner of solemnization—it merely prescribes that:

§ 20-17: "It shall be the duty of every minister or other person celebrating any marriage * * to return the license and certificates of
the clerk, together with his own certificates of the time and place at which the marriage was celebrated, to the clerk who issued the license."

A marriage record such as is filed under this statute may be attacked in a collateral proceeding only on the ground that the marriage is void. Marriage is a civil contract. In the absence of a statutory requirement that the parties be in the presence of each other when entering into such a contract, it would seem that the agreement may be completed at long distance. The essential element is: Was there an actual agreement under a valid license and was this agreement solemnized by a person qualified to do so? Consent of the parties and solemnization under a valid license is all that is required under the Virginia law. The license in this instance, based upon the assumption that all the requirements of the statute were complied with, was certainly valid. The certificate with respect to the result of a serological test is not required to be executed by a physician licensed to practice in Virginia. See § 20-12 of the Code which qualifies a licensed physician of any State, territory or country. The Clerk is not presumed to have issued the license unless the statutory procedure was followed. The minister had the right to rely upon license, and he is satisfied that both the parties agreed to be married. The presumption is that he was satisfied as to the identity of the woman.

In the University of Kansas City Law Review (Vol. XIII-1944-45), there is published an article entitled "Marriage by Proxy and Other Informal Marriages", prepared by W. H. Howery, a graduate (cum laude) from the University of Kansas City Law School, and a member of the firm of Warrick, Koontz and Hazard in Kansas City, Missouri. He was a student editor of the Law Review of that school.

Mr. Howery cites an instance similar to the one under consideration here and quotes as follows from an opinion rendered by the Attorney General of Florida:

"I rendered an opinion some time ago on the validity of a trans-Pacific radio-telephone marriage. In that case the ceremony was performed in the state where the license was issued. The girl, the minister and witnesses were in the conference room of the telephone company where more than one phone was available. The sailor and chaplain were in the Hawaiian area, the chaplain acting merely as a witness for the proper identification of the boy. The customary questions were asked by the minister and answers given by the boy and girl, all within the hearing of all parties. Under that plan the status of husband and wife began immediately upon the consent being given. Considering that such arrangement was a sufficient compliance with the law as to the parties being in the presence of each other, I held that such a marriage would be valid under the law, if performed in this State."

Mr. Howery's article indicated that usually statutes provide that the parties shall both appear before the officiating officer when the marriage is celebrated. There is no statutory mandate of this nature in Virginia.

The tendency of the courts is to uphold the validity of marriages entered into in good faith. I have directed attention to § 20-13 of the Code of Virginia, wherein it is provided that marriages in this State shall be under a license and solemnized in the manner provided herein—meaning the Code sections contained in Chapter 2 of Title 20. There are no decisions of our courts, in so far as I am able to determine, that pass upon the point in question. If the Air Force and other federal agencies continue to refuse to recognize the marriage, it might be possible to obtain an adjudication of the question in appropriate court proceedings relating to the return of the allotment money.
The question was brought in issue in habeas corpus proceedings in the case of United States v. Tuttle, 12 Fed. (2) 927.
I trust that this discussion of this important question will be of assistance to you in bringing the matter to a conclusive determination.

MARRIAGE—Issuance of License After Divorce—Four Month Waiting Period Abolished. (401)
Clerks—Marriage License May be Issued After Entry of Final Divorce Decree. (401)

HONORABLE W. L. PRIEUR, JR.
Clerk of Courts
Norfolk, Virginia

June 22, 1960

This will reply to your letters of June 9 and June 21, 1960, in which you present the following inquiries concerning Section 20-118 of the Virginia Code as amended by the General Assembly at its last regular session:

"1. A divorce is granted June 1, 1960, which contained the four-month provision as set forth in the above section prior to the 1960 Acts. Would the Clerk be authorized to issue a marriage license on the 27th day of June, 1960?
"2. Does the rule that the decree does not become final until the expiration of twenty-one days after its entry prohibit the Clerk from issuing a marriage license on divorce decree when the twenty-one days have not elapsed?"

Section 20-118 of the Code of Virginia (1950) as amended by Chapter 399 of the Acts of Assembly (1960) provides:

"On the dissolution of the bond of matrimony for any cause arising subsequent to the date of the marriage, if objections or exceptions are noted or filed to the final decree and a bond is given staying the execution thereof, the court shall decree that neither party shall remarry pending the perfecting of an appeal from said final judgment of the trial court.
"Marriages heretofore celebrated in violation of any prohibition against remarriage shall not hereafter be deemed to be invalid because of the violation of such prohibition, provided that the parties to such a marriage have continued to reside together as husband and wife until the first day of July, 1960, or until such time as one of the parties dies prior to July one, nineteen hundred sixty; and provided further, that no litigation pending on the effective date hereof shall be affected hereby."

The above quoted statute will become effective June 27, 1960. The corresponding provision of the Virginia Code currently in force in Section 20-118 of the Code of Virginia (1950) which prescribes:

"On the dissolution of the bond of matrimony for any cause arising subsequent to the date of the marriage, neither party shall be permitted to marry again for four months from the date of such decree, and such bond of matrimony shall not be deemed to be dissolved as to any marriage subsequent to such decree, or in any prosecution on
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account thereof, until the expiration of such four months; provided, that nothing herein contained shall be deemed to prohibit divorced persons from remarrying each other at any time."

With respect to the situation outlined in your first question, I am of the opinion that the clerk of the appropriate court of record specified in Section 20-14 of the Virginia Code may properly issue a marriage license on June 27, 1960. Section 20-15 of the Virginia Code prescribes the tax on each marriage license to be collected by the clerk when the license is issued, and Section 20-16 specifies the information which each clerk shall require the parties contemplating marriage to furnish, by oath or affidavit, before the marriage license is issued. If these requirements—and those relating to the filing of a physician's statement as required by Section 20-1 et seq.—have been fulfilled, the clerk in question may properly issue the requested license. However, as the terminal paragraph of the amended statute purports by its terms to validate only those marriages in violation of any prohibition against remarriage which were celebrated prior to June 27, 1960, any marriage in violation of prohibitions against remarriage celebrated after June 27, 1960, would be, at least, of questionable validity.

With respect to your second question, I am of the opinion that the clerk of an appropriate court may properly issue a marriage license—if the prescribed statutory requirements have been fulfilled—even though the twenty-one day period governing the finality of a divorce decree, previously obtained by one or both of the parties contemplating marriage, has not expired. Under the provisions of Section 20-14.1 of the Virginia Code, such license would constitute authority for the solemnization of a marriage of the licensees for a period of sixty days from the date of issuance, and the licensees may not contemplate that the marriage in question will be celebrated until the expiration of the twenty-one day period. Discretion would certainly appear to dictate that no marriage be celebrated within the twenty-one day period during which the divorce decree of one or both of the parties remains under the control of the trial court and subject to being modified or vacated, but I am of the opinion that such considerations would not preclude the issuance of a marriage license by the clerk of an appropriate court during such period.

MARRIAGE—Licenses—Duplicate Issued—Same Expiration Date. (153)

HONORABLE ROBERT D. HUFFMAN
Clerk of Circuit Court of Page County

November 13, 1959

This is in reply to your letter of November 11, 1959, which reads as follows:

“Subsequent to issuance and prior to its expiration, a marriage license has been reported to us as lost before the marriage ceremony had been performed. Is it legally proper to issue a duplicate thereof or should a new license be issued as if none had ever been applied for?”

Section 20-14.1 of the Code, providing that marriage licenses issued under Section 20-14 of the Code shall be valid for a period of only sixty days from the date of issuance, contains this further provision:

“The provisions of this section shall not be construed to prevent licensees from applying for or receiving an additional license, either before or after expiration of any license, but no new license shall be
In my opinion, the provision which I have quoted is intended to enable persons who have obtained a license, but for some reason do not plan to get married during the duration of the license, to receive an additional or new license having an expiration date beyond the date of the original license. I do not feel that this provision is applicable to a situation where the license has been lost and the licensees except to get married within the sixty day period.

Therefore, in my opinion, you should issue a duplicate license if the parties so desire. This duplicate, of course, would have the same expiration date as the original.

I have discussed this matter with the Clerk of the Hustings Court of the City of Richmond, and he states that he frequently issues duplicate licenses and makes a notation on the license as follows: "Duplicate—original lost."

MARRIAGE—Licenses—Party Under Age but Pregnant—Physician’s Certificate Required. (159)

November 20, 1959

HONORABLE JOHN R. PORTER, JR., Clerk
Hustings Court for the City of Portsmouth

I am in receipt of your letter of November 18, 1959, in which you present the following situation and inquiry:

"I have recently had an application for a marriage license wherein the male was a minor twenty years of age and the female was under sixteen years of age. Both parties were not residents of Portsmouth, but both were willing to swear that the female had a child one and one-half years old of whom they were the natural parents.

"Under Section 20-48 of the Code of Virginia I denied the license to them on the grounds that the female did not reside in this city and also that the section referred only to females under the minimum age who could present a doctor's certificate showing pregnancy at the time or within nine months previous to such examination.

"I shall greatly appreciate it if you would comment upon this problem and advise whether, in your opinion, I should continue to refuse licenses under such circumstances under Section 20-48, and including situations where the female resides in this city."

In pertinent part, Section 20-48 of the Virginia Code prescribes:

"The minimum age at which minors may marry, with consent of the parent or guardian, shall be eighteen for the male and sixteen for the female.

"In case of pregnancy when either the female is under sixteen or the male under eighteen, the clerk authorized to issue marriage licenses in the county or city wherein the female resides shall issue proper marriage license with the consent of the parent or guardian of the person or persons under the ages aforesaid only upon presentation of a doctor's certificate showing he has examined the female and that she is pregnant, or has been pregnant within nine months previous to
such examination, which certificate shall be filed by the clerk, and such marriage consummated under such circumstances shall be valid . . . .”

In cases of pregnancy when either the female is under sixteen or the male is under eighteen years of age, the statute in question authorizes the issuance of a marriage license by the clerk empowered to issue such licenses in the county or city wherein the female resides, with the consent of the parent or guardian of the person or persons under age, only upon presentation of the prescribed physician’s certificate. I am, therefore, of the opinion that you should continue to refrain from issuing marriage licenses in situations such as you describe, including those instances in which the female applicant resides in the City of Portsmouth.

MARRIAGE—Licenses—Validity of Marriage—Duties of Clerk and of Bureau of Vital Statistics. (144)

November 5, 1959

HONORABLE DEANE HUXTABLE
State Registrar

This will reply to your letter of October 30, 1959, in which you request an opinion concerning the responsibility of those clerks of courts of record who are authorized to issue marriage licenses and the responsibility of the Bureau of Vital Statistics in connection with marriages performed under circumstances outlined in your communication in the following language:

“Residents of other states, specifically North Carolina, will present themselves to Virginia County Clerks and after proper qualification will obtain a license to marry. Section 20-14 of the Virginia Code is clear in that when a prospective bride is not a resident of this State a marriage license must be issued by the Clerk of the Circuit Court of the county or of the Corporation Court of the city in which the marriage is to be solemnized. The difficulty is that even though marriage applicants are notified by the Clerks that such marriages must be performed within the jurisdiction which issued the license, the prospective bride and groom will, nonetheless, return to North Carolina and have the marriage solemnized by a North Carolina minister. The North Carolina minister then makes the proper return to the Virginia Clerk issuing the license and a copy of the eventual certificate is received in the Bureau of Vital Statistics.”

In situations such as you describe, it does not appear that the clerk has issued a marriage license contrary to law or failed to perform any of the duties enjoined upon him by the provisions of Title 20, Chapter 2, Code of Virginia (1950) as amended. Although the validity of a marriage solemnized under the circumstances you mention is highly doubtful, I am of the opinion that, in such instances, the various clerks involved should follow the procedure prescribed by Sections 20-16 through 20-20 and 20-35 for the filing of licenses and certificates and the transmission of copies thereof to the Bureau of Vital Statistics, and that the Bureau of Vital Statistics should file and preserve such copies in accordance with the provisions of § 20-36 of the Virginia Code.
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MARRIAGE—Miscegenation—White and Vietnamese. (385)

HONORABLE J. ROBERT SWITZER, Clerk
Circuit Court of Rockingham County

June 13, 1960

This is in reply to your letter of June 6, 1960, which reads as follows:

"We have had application for the issuance of a marriage license to foreign students at one of our local colleges, the applicants being German and Vietnamese, respectively.

"With specific reference to Section 20-54 of the Code, will you please give me your opinion as to whether a license may be issued to these applicants. The prospective bride, we have been advised, has a French father and Vietnamese mother."

Section 20-54 of the Code of Virginia reads as follows:

"It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term 'white person' shall apply only to such person as has no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasic blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter."

I am of the opinion that you cannot issue a marriage license in the above situation. This is because a German is of Caucasian race and a Vietnamese is of a non-Caucasian race, and such a marriage is specifically prohibited in Section 20-54.

MAYOR—Authority to Issue Warrants. (357)

HONORABLE EARL C. BOYER, Mayor
Town of Fries

May 19, 1960

This will reply to your letter of May 12, 1960, in which you inquire whether or not you may legally issue civil warrants.

Section 7 of the Charter of the Town of Fries authorizes and requires the Mayor thereof to try all prosecutions, cases and controversies which may arise under the by-laws and ordinances of the town, and to inflict such punishments as are provided by law. Acts of Assembly (1926) Chapter 154, p. 281. When the reorganization of courts not of record in the Commonwealth was effected by enactment of Chapter 555 of the Acts of Assembly of 1956, subsequently codified as new Title 16.1 of the Virginia Code, the court presided over by the Mayor of the Town of Fries was continued as a court of limited jurisdiction by Section 16.1-70 of the Virginia Code. Moreover, Section 16.1-75 provides:

"No mayor, except when serving as the presiding officer of a court of limited jurisdiction therein, shall, within any incorporated town, or in any city in which a county court has jurisdiction under the pro-
visions of chapter 4 (Sec. 16.1-64 et seq.) of this title, exercise any civil or criminal jurisdiction conferred upon such county court. Any mayor or other trial officer authorized to preside over a court of limited jurisdiction under this chapter shall, however, have within his territorial jurisdiction, the same power to issue attachments, warrants and subpoenas within the jurisdiction of such county court as is conferred upon the judge of the court, and he shall also have power to grant bail in any case in which he is authorized by general law to grant bail, and to receive his fee therefor. But any such attachment, warrant or subpoena shall be made returnable before the county court for action thereon." (Italics supplied).

Since Section 16.1-27 of the Virginia Code authorizes the Judge of the County Court of Grayson County to issue “warrants, summons and subpoenas, including subpoenas duces tecum or other process, in civil and criminal cases, . . .” I am of the opinion that you, as Mayor and presiding officer of a court of limited jurisdiction, are also empowered by Section 16.1-75 to issue such process, including warrants in civil cases.

MENTAL HYGIENE AND HOSPITALS—Business Manager—Authority
Over Personnel Supersedes Virginia Personnel Act. (355)

HONORABLE CHARLES T. MOSES
Member, State Senate

May 19, 1960

Reference is made to your recent conference in this office with respect to a question raised by Mr. James V. Giles, a former employee of the Department of Mental Hygiene and Hospitals. I also have before me your letter delivered to one of my assistants at the time of the conference. Your letter reads as follows:

“Mr. James V. Giles of Route 3, Box 320, Lynchburg, Virginia has presented me with a document containing voluminous evidence showing that Mr. A. E. H. Ruth, Director (Business Manager) for the Division of Mental Hospitals and Hygiene has violated (a) the Constitution of Virginia, (b) the Virginia Personnel Act of 1942, and (c) the Governor’s Orders outlining the duties of the Director.

“In conjunction with the above, the document also contains evidence that Mr. Arve Lee, Business Manager at the Lynchburg Training School and Hospital, without authority, unjustly and illegally separated Mr. Giles from his position as Agency Personnel Officer for the institution.

“Briefly, Mr. Giles contends that as Agency Personnel Officer he functioned in accordance with Paragraphs 2-81, 2-83 and 2-82 of the Virginia Personnel Act of 1942 and that he is responsible directly to the Governor (Chief Personnel Officer) through the Director of the Division of Personnel (Deputy Personnel Officer). The above mentioned paragraphs, dealing with organization, have never been amended by an act of the Legislature.

“Mr. Giles states that the position of Director (Business Manager) was authorized by amending Section 37-34.5 of the Code and Mr. Ruth was appointed pursuant to that Section. As the Governor, under Paragraph 2-82 of the Personnel Act, is prohibited from issuing rules in conflict with the Personnel Act, Mr. Giles contends that the Director
has no authority to exercise control over the Agency Personnel Officer or over the administration of the Personnel Act.

"This matter was brought to my attention in my capacity as president pro tem of the Senate and is of further concern to me as the Lynchburg Training School and Hospital is located in my eleventh senatorial district. I shall appreciate your assigning an assistant to this matter and render a formal opinion to me and Mr. Giles with copies being distributed to the Governor, the Director of the Division of Personnel, and Senator E. E. Willey the chairman of the State Hospital Board."

You are familiar with the facts in connection with Mr. Giles' case, since they are stated in the findings made by Honorable Harris Hart in his report to the Governor, dated April 30, 1958, copy of which was mailed to you on May 4, 1960.

Mr. Giles has written several letters to this office relative to his complaint and today we have received another letter, dated May 17, 1960, in which he presents the question he wants answered as follows:

"Does the Director of Mental Hospitals, whose position was authorized by an act of the Legislature, in 1956, amending Section 37-34.5 of the Code, have authority to exercise supervisory control over Agency Personnel Officers in the Division of Mental Hospitals whose positions are authorized, under Paragraph 2-83 of a separate act of the Legislature, in the Virginia Personnel Act of 1942 (Chapter 2, Title 9, Code of Virginia)?"

This question is substantially as presented in your letter which was left with this office on May 4, and I shall treat it as coming from you.

The answer to the question is in the affirmative. See § 37-34.3 of the Code. This section expressly places in the Director the "general business management of the hospitals" * * * "and employment of personnel necessary to aid him in the discharge of his duties."

Furthermore, this section directs the Governor to execute an executive order defining the duties of the business manager. Governor Stanley issued such an order on June 12, 1956, and one of the duties delegated to the business manager was "personnel administration; (except medical, nursing and other related personnel)."

Subsequently, on August 9, 1956, Governor Stanley issued a second executive order delegating to the business manager control over "personnel administration, subject to the following limitation: The Commissioner shall have authority to employ, supervise and discharge medical, nursing and other related personnel."

It is clear from the provisions of the Code Section under consideration and the executive order of the Governor, that the business manager has supervisory control over all personnel (subject to the exception pertaining to the medical personnel) of the Department of Mental Hygiene and Hospitals, responsible only to the Governor.

MENTAL HYGIENE AND HOSPITALS—Commitments of Persons Charged with Criminal Offenses—Detention Period—Records—Costs. (189)

Dr. Theodore G. Denton
Acting Superintendent,
Central State Hospital

This will reply to your letter of November 20, 1959, in which you advise that
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there has been a steady increase in the number of instances in which various courts of the Commonwealth have committed individuals charged with criminal offenses to Central State Hospital for psychiatric evaluation. In this connection, you present a series of inquiries concerning the authority and responsibility of officials and staff members of Central State Hospital and the appropriate procedure to be followed by them in such situations. These questions will be considered in the order presented in your communication.

1. Following our evaluation of an individual sent to us by court order observation, how long are we permitted to detain such an individual on such an order?

If the person committed for evaluation is found to be neither insane nor feeble-minded, the superintendent should give ten days' notice in writing to the clerk of the court from which the individual was committed and return such person to the custody from which he was removed. See, Section 19-204, Code of Virginia (1950). If the person committed is found to be either insane or feeble-minded, the hospital officials should report such finding to the court from which such person was committed and detain him until further order of the court.

2. If in our opinion the person in question is insane and should remain hospitalized, can he be detained on the original observation order or must a superseding detaining order or commitment be obtained?

If an individual is initially committed for evaluation and found to be insane, the findings of the hospital authorities should be communicated to the court from which the individual in question was committed and a further order of commitment obtained.

3. Assuming that the patient has been returned to the court by us following psychiatric evaluation, to whom are we obligated to give information besides the court; the Commonwealth's Attorney, the defense attorney, or both?

4. Is it obligatory or advisable for me to make hospital records available or to give information on demand to the defense attorney, without their being subpoenaed?

Since both of the questions stated immediately above relate to the same general subject, they will be considered together. I am of the opinion that hospital authorities to whom an individual has been committed for psychiatric evaluation should give information concerning the individual's mental condition to the Commonwealth's Attorney or to the individual’s attorney, and should make available to such attorneys—both of whom are officers of the court—such hospital records and information as may be pertinent to the subject of the mental condition of the person committed.

5. Can the professional staff of the hospital be subpoenaed to give expert testimony as to an accused's mental status, competency, etc. by the defense attorney's request?

Yes.

6. Is there any way that the courts can be required to schedule our appearances?

In the absence of any statutory requirement, I am of the opinion that the various courts of the Commonwealth cannot be compelled to schedule the appearance of members of the hospital staff.

7. Who is responsible for reimbursement of expenses for travel, meals, lodging, when someone is subpoenaed to testify?
Allowances for witnesses summoned on behalf of the Commonwealth, and allowances for witnesses otherwise summoned, are specified in Sections 14-186 and 14-187, respectively, of the Virginia Code. In those instances in which the witness attends on behalf of the Commonwealth, such allowances are paid out of the State treasury, or by the treasurer of the county or corporation in which the trial is held, with subsequent reimbursement from the State treasury. In all other cases, such allowances are paid by the party for whom the summons was issued. Sections 14-186 and 14-188, Code of Virginia (1950).

I regret that the pressure of business in this office has prevented an earlier reply to your communication.

MENTAL HYGIENE AND HOSPITALS—Detention of Mentally Ill Beyond 45-Day Period Requires Formal Commitment—Warrant Must be Issued and Patient Must be Represented by Counsel. (2)

HONORABLE DALE W. LARUE
Judge of Juvenile and Domestic Relations Court
for Carroll County

This is in reply to your letter of June 30, in which you state that a person was admitted to Southwestern State Hospital pursuant to the provisions of Section 37-103 of the Code. Under this section the patient may be admitted without an order of a judge or justice. Detention of the person so admitted is limited to forty-five days. Section 37-106. You state that as a result of the examination of the patient, the Superintendent of the Hospital advised you that the patient was found to be mentally ill and furnished you with an order of commitment, and that you, acting under Section 37-110, executed the order and filed one copy with the Clerk of the Circuit Court and mailed the other copy to the Superintendent.

It appears that you signed the commitment papers, but that the patient was not represented by counsel. You raise a question as to whether the provisions of Section 37-61.2 are applicable in this case. The Superintendent has requested you to comply with this section.

Section 37-109 of the Code, as amended by Chapter 154 of the Acts of Assembly, 1958, provides as follows:

“If any person admitted under §§ 37-103 to 37-106 is found upon observation to be mentally ill, epileptic or mentally deficient within forty-five days after he is admitted to the hospital, he may be committed as provided in article 1 (§ 37-61 et seq.) of the chapter. The superintendent of the hospital to which the person has been admitted shall notify the judge of the circuit or corporation court, or judge of the county or city court from which the person was received. The superintendent shall forward with the notification two copies of the medical certificate and the order of commitment.”

Section 37-61.1 is contained in Article 1. This section was enacted by Chapter 595, Acts of 1958, and became effective as a part of Article 1 at the same moment the amendment to Section 37-109 became effective. In my opinion there is no escape from the conclusion that in order for this patient to be legally detained in the hospital subsequent to the forty-five day period, he will have to be committed in accordance with the procedure provided for in Article
1 of Chapter 3 of Title 37, which procedure includes the appointment of counsel for the patient in the event it is ascertained that he is not represented by counsel.

You make the following observation:

“There are no papers of any kind in my office with reference to this person. To comply with the request of the superintendent it appears that it would be necessary to cause the patient to be brought before me, subpoena the doctors at the hospital, appoint an attorney to defend the patient, conduct a hearing, and enter the order.”

When a person is admitted to one of the State Hospitals under Section 37-103, he has not been formally committed. The admission is temporary only, and must be followed up by complying with the procedure set forth in Article 1. In my opinion, due to the mandate contained in Section 37-61, you will be required to issue a warrant ordering the person to be brought before you, and comply with the other statutory requirements contained in Article 1.

MENTALLY ILL—Commitment—Arrests—Escapees. (125)

HONORABLE HARRY N. PHILLIPS, JR.
Special Justice, City of Richmond

This is in reply to your letter of October 13, 1959, which reads as follows:

“In my official capacity of Special Justice, appointed pursuant to the provisions of Section 37-61.2 of the Code of Virginia, I shall appreciate it if you will render me an opinion on the following question:

“Under the provisions of Section 37.61 of the 1950 Code of Virginia, as amended, a warrant is properly issued by a Special Justice appointed under the provisions of Section 37-61.2 against a person who is physically in the city of Richmond at the time the warrant is issued, said person being a resident of a county in the state. Subsequent to the issuance of the warrant, and before service, said person leaves the city of Richmond and returns to the county of his residence. If the statutory requirements of Section 37-97.1 of the Virginia Code are complied with, is it proper for the sheriff of the county in which said person is found to take such person in custody and transport him to the city in which the warrant was issued, delivering him before said Special Justice, or do you consider Section 37-97.1 applicable only to escapees?”

Section 37-97.1 to which you refer, reads as follows:

“Any officer authorized to make arrests is authorized to make such arrests under warrants issued under the provisions of §§ 37-61, 37-85, 37-97 or 37-221, without having such warrant in possession, provided the warrants have been issued and the arresting officer has been advised of the issuance thereof by telegram, radio or teletype message, which telegram, radio or teletype message shall give the name of the person wanted, shall direct the disposition that is to be made of the person when apprehended, and shall give the basis of the issuance of the warrant.”

In my opinion, this statute is not intended to apply to escapees only. Sections
37-85, 37-97 relate to escapees. Section 37-221 relates to cases where a person on parole has violated the conditions of his release. Section 37-61 relates to the issuance of warrants to have a person suspected of being mentally ill, etc., brought before the issuing officer. Section 37-97.1 specifically authorizes arrests under the procedure stated therein in cases where the warrant has been issued under either Code Sections 37-61, 37-85, 37-97 or 37-221.

I am of the opinion that under a state of facts such as you present in the first paragraph of your letter, your first question must be answered in the affirmative. The answer to your second question is in the negative.

MENTALLY ILL—Commitment—Judges of Certain Courts May Not Commit to Private Hospitals. (253)

March 2, 1960

HONORABLE HARRY N. PHILLIPS, JR.
Special Justice, City of Richmond

This will reply to your letter of February 19, 1960, in which you call my attention to the provisions of Sections 37-61.1 and 37-99 of the Virginia Code and inquire whether or not an individual "may legally be committed to a private hospital for observation as to his or her mental condition."

In pertinent part, Sections 37-61.1 and 37-99 of the Virginia Code respectively prescribe:

"Sec. 37-61.1.—Any person alleged or certified to be mentally-ill or mentally defective and in need of institutional care and treatment, and who is not in confinement on a criminal charge, may be admitted to and confined in a State or private institution by compliance with any one of the following procedures:

“(1) Voluntary admission.
“(2) Commitment for observation.
“(3) General commitment." (Italics supplied).

"Sec. 37-99.—The judge of any circuit or corporation court, or any judge of a county or municipal court upon written request of any respectable citizen accompanied by the certification of a duly licensed physician, who shall if practicable be the person's family physician, upon forms prescribed by the State Hospital Board, may commit to any State hospital for observation as to his mental condition, any suitable person in his county or city who is not an inebriate or drug addict." (Italics supplied).

With respect to the above quoted statute, you point out that Section 37-61.1 purports to authorize the commitment of an individual for observation to either a State or a private institution, but that Section 37-99, which relates specifically to commitments for observation, only authorizes such commitments to be made to a State hospital. Under these circumstances, I am constrained to believe that the provisions of Section 37-99—which specifically authorize the judges of certain courts to commit persons for observation to any State hospital but do not authorize such judges to commit persons for observation to private hospitals—would prevail over the general language of Section 37-61.1. In this connection, Section 37-102 of the Virginia Code—the terminal section of Chapter 3, Article 2, relating to commitments for observation—prescribes that individuals initially
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committed for observation may be generally committed as mentally-ill, epileptic or mentally deficient upon the duly sworn certificate of "the superintendent of a State hospital and one or more physicians of the hospital staff who have made a careful psychiatric study to determine" the mental condition of the individual in question. It would thus appear that Sections 37-99 through 37-102 of the Virginia Code do not contemplate that individuals shall be committed for observation to private hospitals.

MENTALLY ILL—Commitment—Jurisdiction of Municipal and Circuit Courts of City. (101)

HONORABLE G. GARLAND WILSON
Commonwealth Attorney for the City of Radford

September 24, 1959

I have received a letter from Dr. James P. King, Director of Saint Albans Hospital, relating to my opinion furnished you under date of September 21st with respect to the jurisdiction of the municipal and circuit courts of the city of Radford to make commitments under Title 37 of the Code of patients hospitalized in Dr. King's hospital. I note that Dr. King mailed a copy of this letter to you.

Dr. King asks the following question:

"Would you give Attorney Wilson your opinion upon the legality of Radford officials serving as judges in commitment procedures if the patient is brought before them in person?"

Under Section 37-61 of the Code all persons for whom a commitment is sought are required to be brought before the judge who hears the case. The personal appearance of the patient before one of the Radford courts would not remedy the situation. As I pointed out in my previous opinion, Radford courts do not have jurisdiction over persons who are residing in Pulaski county.

Under Section 37-61.2, the judge of the Circuit Court of Pulaski County has the power to appoint a special justice whose powers and jurisdiction would be limited to commitment proceedings under Title 37. This section reads as follows:

"The authority having the power to appoint the justice or trial justice defined in § 37-1.1 may appoint one or more special justices who shall be licensed, practicing attorneys at law, for the purpose of performing the duties required of the justice or trial justice by this title. Such special justice or justices, when so appointed, shall have all the powers and jurisdiction conferred upon the justice or trial justice by this title. The special justice or justices shall serve under the supervision and at the pleasure of the authority making the appointment. The special justice or justices shall collect the fees prescribed in this title for such service and shall retain fees unless the governing body of the county or city in which such services are performed shall provide for the payment of an annual salary for such services, in which event such fees shall be collected and paid into the treasury of such county or city."

Under Section 37-75 any special justice appointed pursuant to the provisions of Section 37-61.2 shall receive a fee of $10.00 for his service in each case. Furthermore, such justice would be entitled to receive mileage.
It occurs to me that perhaps some lawyer living in the town of Pulaski would be willing to undertake this provided Judge Matthews would appoint him as special justice.

Section 37-61.2 does not specifically require that the special justice shall be a resident of the county for which he is appointed. Section 32 of the Constitution of Virginia relates to the qualification of officers and reads as follows:

"Every person qualified to vote shall be eligible to any officer of the State, or of any county, city, town or other subdivision of the State, wherein he resides, except as otherwise provided in this Constitution, and except that this provision as to residence shall not apply to any office elective by the people where the law provides otherwise; and except, further, that the requirements of this section as to residence and voting qualifications shall not apply to the appointment of persons to fill positions or posts requiring special technical or professional training and experience.

"Persons eighteen years of age shall be eligible to the office of notary public and qualified to execute the bonds required of them in that capacity."

It will be noted under this section that the requirements as to residence shall not apply to appointment of persons to fill positions or posts requiring special professional training and experience. Section 37-61.2 of the Code provides that the special justice be a licensed practicing attorney at law. I believe that this office would be a position or post requiring professional training and experience as contemplated by Section 32 of the Constitution and that a lawyer living in the city of Radford would be eligible for appointment to this position. He, of course, would have to hold his hearings in Pulaski County.

MENTALLY ILL—Commitment—Payment of Fees—Report of Clerk. (134)

HONORABLE HIRAM W. DAVIS, Commissioner
Department of Mental Hygiene and Hospitals

October 20, 1959

This is in reply to your letter of October 6, 1959, in which you enclosed a letter to you from Honorable James E. Crockett, Clerk of the Circuit Court of Wythe County, and requested my opinion on the questions posed by Mr. Crockett. You state that his questions refer to §§ 37-103 through 37-112 of the Code of Virginia.

Mr. Crockett's letter reads as follows:

"Thanks for your information given, and I have one further question as to the M.D. and Attorney fees on the temporary commitments. If the patient is not committed after the 45 days, and the papers are never filed in this office, is the Board of Supervisors supposed to pay the $30.00 (2 M.D.s and Atty.) and if so, how does the Auditor check this against the Commitment Papers that are never filed here.

"If after the above bills have been presented to the Board for payment and the 45 days elapse and the patient is then committed by different Doctors, (generally in Marion) is a fee due to them and the Attorney representing the patient at this hearing?

"When the Commitment is filed in this office and I make the report
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do I show the original date of being sent for observation or the date that the patient was actually committed (45 days generally after being sent originally)?"

In answer to the first question propounded, I am of the opinion that the county of residence of the patient in question, who is certified pursuant to § 37-103 of the Code of Virginia, must pay the three ten-dollar fees you mentioned. Section 37-112 of the Code provides:

“For services rendered under the preceding sections of this article the same fees shall be paid, to the same persons, from the same source, and in like manner as provided by law in cases of regular commitments.”

This mandate of the General Assembly relates back to § 37-75, as amended, which latter section prescribes that these fees shall be paid by the county or city of which such person was a legal resident.

The Auditor of Public Accounts can very easily check these expenditures against the statements rendered to the Board of Supervisors by the two physicians and by the attorney who represents the patient. In the event the patient is later formally committed to the State hospital or colony, this statement may be filed with the record of proceedings before the commission which orders such formal commitment.

Mr. Crockett's second question involves consideration of §§ 37-109 and 37-110, as well as §§ 37-112 and 37-75. I am enclosing a copy of an opinion, dated April 25, 1957, rendered to the Honorable B. Hunter Barrows, Judge of the Dinwiddie County Court, by my predecessor in office. I concur in the finding of this opinion that the fees and expenses incidental to the formal commitment of a person in the custody of and detained in a State hospital or colony should be borne by the State, pursuant to § 37-75, as amended, of the Code of Virginia.

With regard to Mr. Crockett's third question, the provisions of § 37-77 of the Code of Virginia require the clerk to notify the Commissioner of Mental Hygiene and Hospitals “* * * giving the name and age, sex, and color of the mentally ill, * * * person, the date of the finding of the commission and the custody to which the mentally-ill * * * person was committed.”

MENTALLY ILL—Commitment—Place of Hearing May be Held Anywhere Within Jurisdiction of Special Justice. (54)

HONORABLE HARRY N. PHILLIPS, JR.
Special Justice, City of Richmond

August 12, 1959

This is in reply to your letter of August 8, 1959, which reads as follows:

“Section 37-61 provides that a judge or trial justice shall issue a mental warrant under certain conditions, requiring the patient to be brought before him, without specifying where. As a special justice appointed pursuant to Section 37-61.2 I have the duty to issue such warrants. For a number of years it has been customary to have such patients brought to the psychiatric ward of MCV Hospital, where the patient is kept over night, if necessary, and commitment proceedings attended the following day. That is the only place except the city jail where such a patient can be brought.

“Section 37-71 provides that following commitment, a patient shall be sent to MCV hospital to be kept until such time as the patient is
conveyed to the institution to which he has been committed. Section 37-78 prohibits a committed patient being held in jail awaiting transportation unless there is no other place available.

“In view of the fact that MCV hospital is a state institution, I should appreciate it if you will give me your opinion as to whether I am within my rights in having a patient brought to MCV hospital under my warrant, to await Commitment proceedings.”

Section 37-61 of the Code provides that a justice “upon the written complaint and information of any respectable citizen, shall issue his warrant, ordering such person (a mentally ill or other person mentioned therein) to be brought before him.” In my opinion the person named in the warrant may be brought before the justice to any place within the justice’s jurisdiction. Therefore, if it is agreeable with the Medical College of Virginia Hospital, you may have the person brought before you at the Hospital. I do not feel that the statute authorizes the issuance of a warrant to have a person brought by an officer to a place to be kept overnight pending a hearing to be held the next day.

After a person is brought before a justice, if it appears that a hearing may not be held forthwith, I am of the opinion, if the justice, from his observation of the person and consideration of such relevant facts as may be then brought to his attention at that time, is of the opinion that such person should be detained pending the hearing, then it would be proper to cause the person to be held temporarily in a suitable place in the Hospital.

MINES AND MINING—Assistant Mine Foremen—Experience Required for Service. (225)

February 1, 1960

MR. T. K. SUTHERLAND
Member, Board of Mine Examiners

On January 4, 1960, I furnished you with an opinion in reply to your request of December 15, 1959 for the advice of this office on the following question:

“Relative to Chapter 2, Sections 45-30, 45-31 and 45-33.1, of the Mining Laws of Virginia, (1) in order to act as General Mine Foreman in a gaseous mine, how much experience in a gaseous mine must you have and (2) in order to act as Section Foreman in a gaseous mine, how much experience in a gaseous mine must you have?”

Since writing this letter I have discussed the matter with W. F. Mullins, Assistant Chief Mine Inspector. As you will recall, the terminal paragraph of my letter of January 4th, was as follows:

“While the statute is not free from doubt, I am constrained to express the opinion that the intent of the legislation is to require that in order for a person to be entitled to serve as a mine foreman (which would include a section foreman) in a gaseous mine he must have had the length of experience in that type of mine as is prescribed in Section 45-30 for mines generally.”

I find that Section 45-34 of the Code contains this provision:

“Every assistant foreman and section foreman employed to assist the mine foreman in the immediate supervision of a portion or the
whole of a mine and the persons employed therein shall have had three years of practical experience in a coal mine and shall hold a certificate of competency for such position issued to him by the Board of Examiners."

It would seem that under this provision persons who perform the duties of assistant foreman and section foreman—that is, persons who assist the mine foreman in such capacities are required to have three years of practical experience underground in a coal mine and shall hold a certificate of competency for such position issued by the Board of Examiners.

Therefore, my opinion of January 4, 1960 is modified to this extent.

MINES AND MINING—Board of Examiners—Certificates of Competency—Mine Superintendent Not Required to be Certified by Board. (55)

HONORABLE T. K. SUTHERLAND
Member, Board of Mine Examiners

August 13, 1959

This is in reply to your letter of August 8, 1959, which reads as follows:

"Relative to Chapter 2, Section 45-23, of the Mining Laws of Virginia, I would like to have your opinion on the following question: Must coal mine superintendents hold Certificates of Competency issued by the Board of Mine Examiners to be legally qualified to serve as a superintendent of any coal mine in Virginia?"

Section 45-23 requires the Board of Examiners to examine and certify as eligible for certificates, mine inspectors, superintendents, mine foremen, assistant or section foremen and fire bosses. The nature of the certificates for which such persons may be found eligible is not stated. It seems clear that persons who are successful in passing the required examination are entitled to receive a certificate of some kind, but I am unable to find any statutory provision requiring a superintendent to be the holder of a certificate of competency.

Section 45-31 provides that the Board of Examiners shall be entitled to grant mine foremen's certificates of first and second class. Section 45-32 provides that each fire boss "shall hold a fire boss certificate." Section 45-33.1, subject to certain exceptions, provides that no person shall act as fire boss unless he is in possession of a certificate of competency. This section contains a similar provision with respect to mine foremen. Section 45-34 provides that every assistant mine foreman and section foreman shall hold a certificate of competency. There is no provision comparable to those just cited requiring a superintendent to be the holder of a certificate of competency.

By reference to Section 45-0.2 containing various definitions, it will be seen that paragraphs (f) and (h) define "mine foreman" and "fire boss" as persons holding a valid certificate of qualification, while paragraph (d) defines "superintendent" as the person placed in over-all charge of the operation of a coal mine or mines.

In light of these statutory provisions, I am of the opinion that the answer to your question is in the negative.

Section 45-23 and related sections authorize the Board to give examinations to certain mine workers in the categories mentioned therein and to issue certificates to the persons examined as to their fitness and qualifications to perform certain types of supervisory duties at coal mines. Manifestly it would be an advantage
to any person seeking a position as a mine superintendent to have been examined by the Board of Examiners and to have been certified as eligible for such a certificate. For the same reason it is reasonable to assume that an employer seeking a mine superintendent would give due consideration to the fact that the applicant had been examined and certified as eligible.

However, I am unable to find any provision in Title 45 of the Code prohibiting a person from holding a position as mine superintendent who does not hold a certificate of competency, or any other certificate, issued by the Board of Examiners appointed under Chapter 2 of Title 45.

MINES AND MINING—Qualifications of Mine Foremen—Gaseous Mines.
(199)

Mr. T. K. Sutherland
Member, Board of Mine Examiners

January 4, 1960

This is in reply to your letter of December 15, 1959, which reads as follows:

"On December 15, 1959, I wrote for a ruling on the following:

"1. Relative to Chapter 2, Sections 45-30, 45-31 and 45-33.1, of the Mining Laws of Virginia, (1) In order to act as General Mine Foreman in a gaseous mine, how much experience in a gaseous mine must you have, and (2) In order to act as Section Foreman in a gaseous mine, how much experience in a gaseous mine must you have?"

"I find that it is imperative that we have your ruling by January 15th due to the fact that several foremen in the mining industry who have had very little or no experience in gassy mines will be transferring from non-gassy to gassy mines in the very near future. Therefore, it would be advantageous for those foremen who will be affected, as well as the Board of Mine Examiners, who must certify to the competency of these men."

I am unable to find that there is any statutory definition of either a General Mine Foreman or a Section Foreman. I assume, however, that both classifications include the term "mine foreman" as used in Sections 45-30 and 45-31 of the Code. Under Section 45-30 applicants for first and second class mine foreman certificates shall have had at least five years practical experience, at least three years of which shall have been spent under ground in a coal mine, subject to a proviso that is not essential to this opinion. None of the sections of the Code relating to this question specifically prescribe the necessary length of experience in a gaseous mine. Paragraph (c) of Section 45-33.1 provides that no person shall be employed as a mine foreman or temporary mine foreman in any coal mine classed as gaseous or gassy unless he has had experience in coal mines generating explosive gas.

While the statute is not free from doubt, I am constrained to express the opinion that the intent of the legislation is to require that in order for a person to be entitled to serve as a mine foreman (which would include a section foreman) in a gaseous mine he must have had the length of experience in that type of mine as is prescribed in Section 45-30 for mines generally.
MOTOR VEHICLES—Coal Trucks—Statute Requires Covering to Prevent Load Blowing. (167)

November 27, 1959

HONORABLE DONALD A. McGLOTHLIN
Commonwealth's Attorney
Buchanan County

This is in response to your letter of November 16, 1959, which reads as follows:

"Due to the Bituminous Coal Industry of Buchanan County there is a great deal of coal transported by trucks. These trucks have beds without covers on them and consequently the coal hauled blows from the tops of the loads onto the State Highway creating a great amount of coal dust for adjacent property owners and further creates a traffic hazard to following vehicles.

"Please advise this office if Section 46.1-303 (1950 Code of Virginia) would apply to this instance and whether or not we could force the operators of these trucks to cause canvas coverings to be placed over the coal loads."

In view of the facts contained in your letter as set forth above, I am of the opinion that the coal trucks in question are being operated in violation of § 46.1-303 of the Code of Virginia, which section reads as follows:

"No vehicle shall be operated or moved on any highway unless such vehicle is so constructed as to prevent its contents from dropping, sifting, leaking or otherwise escaping therefrom."

The penalty for the violation of § 46.1-303 is provided for in § 46.1-16, which section reads as follows:

"(a) It shall be unlawful and constitute a misdemeanor for any person to violate any of the provisions of chapters 1 through 4 (§§ 46.1-1 through 46.1-347) of this title, unless such violation is by any of such provisions declared to be a felony.

"(b) Every person convicted of a misdemeanor for a violation of any of the provisions of such chapters for which no other penalty is provided shall, for a first conviction thereof, be punished by a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment in jail for not less than one nor more than ten days, or by both such fine and imprisonment; for a conviction for a second such violation within one year such person shall be punished by a fine of not less than ten dollars nor more than two hundred dollars or by imprisonment in jail for not less than one nor more than twenty days, or by both such fine and imprisonment; for a conviction of a third or subsequent violation within one year such person shall be punished by a fine of not less than twenty-five dollars nor more than five hundred dollars or by imprisonment in jail for not less than ten days nor more than six months, or by both such fine and imprisonment."

There is nothing contained in either of the above-quoted sections which authorizes a law enforcement officer to force the operators of the coal trucks to place canvas covers on their trucks. I believe, however, that it would be proper for an officer to suggest to these operators that they equip their trucks so as to prevent its contents from dropping, sifting, leaking or otherwise escaping their-from while traveling on a highway.
HONORABLE THOMAS E. WARRNER, JR.
Commonwealth's Attorney of Brunswick County

This is to acknowledge receipt of your letter of January 7, 1960 in which you request my opinion on the following question:

"Does a truck, with gross weight of 10,000 pounds or less, and bearing TH tags, have to show on the side of the vehicle either the gross weight, empty weight or name and address of the owner?"

Your attention is invited to Section 46.1-158 of the Code, which reads as follows:

"The owner of every vehicle registered under §§ 46.1-154, 46.1-155, 46.1-149 (4), 46.1-156, and 46.1-157 except those falling within the gross weight group of ten thousand pounds and less as shown in § 46.1-154 shall cause to be painted on each side of such vehicle, in letters and figures of such color and in such position as shall be prescribed by the Commissioner, not less than three inches in height, the empty weight of the vehicle and the gross weight on the basis of which it is registered and licensed, and to have painted, or otherwise plainly and legibly shown, on both sides of such vehicle, except in the case of private carriers, in letters not less than three inches in height, the name and address of the owner of such vehicle." (Italics supplied)

and Section 46.1-64:

"No person shall:

"* * * * *

"(f) Operate or cause to be operated or permit the operation of a 'for hire' vehicle over or on the highways of this State unless the name and address of the owner of such vehicle plainly appears on both sides of such vehicle in letters not less than three inches in height, provided that the provisions contained in this paragraph shall not apply to * * * (certain types of vehicles are enumerated) * * * * *"

The first part of Section 46.1-158 ending with the word "licensed" on line ten has been a part of the Motor Vehicle Code for many years. The purpose thereof was to aid in the enforcement of the registration section where the fees were based on gross weight. In 1948 the last portion of said section was added which required the owners of all such vehicles, other than private carriers, to place their names and addresses on said vehicles. At the same time paragraph (f) was added to Section 46.1-64 which made it unlawful for anyone to operate a "for hire" vehicle unless the name of the owner and his address appears on the vehicle. Both of these amendments were contained in Chapter 492, Acts of 1948. In administering and enforcing these statutes, it was necessary to recognize that both sections were valid and this was accordingly done by interpreting Section 46.1-158 to mean that the owner of every such vehicle, as much as ten thousand pounds or more in weight, should place thereon the empty weight and the gross weight and if the vehicle were a "for hire" vehicle (not a private carrier vehicle) the owner's name and address must also be placed thereon. The provisions of Section 46.1-64 apply to all "for hire" vehicles (with certain exceptions) regardless of their weight; the owner's name and address must be placed thereon.
I am, therefore, of the opinion that the owner of a truck with a gross weight of ten thousand pounds or less which operates the vehicle as a contract carrier, having the same licensed with TH plates (tags) is required to place on both sides thereof his name and address. If such truck has a gross weight of more than ten thousand pounds, the owner must also have the empty weight and the gross weight printed thereon.

MOTOR VEHICLES—"Go Carts"—Must be Registered and Insured or Uninsured Fee Paid. (276)

March 18, 1960

HONORABLE TOM FROST
Member of the House of Delegates

This is to acknowledge receipt of your letter of March 4, 1960 in which you state in part:

"I am interested in obtaining your opinion as to the validity of children operating the small 'go cars with gasoline engines' on the streets or highways."

These small vehicles are usually classified as "motorcycles" as they come within the definition thereof as set forth in Section 46.1-1(14) which is as follows:

"Every motor vehicle designed to travel on not more than three wheels in contact with the ground and any four-wheel vehicle weighing less than five hundred pounds and equipped with an engine of less than six horsepower, except any such vehicle as may be included within the term 'farm tractor' as herein defined."

If they are to be operated on the highways, the owner must have them registered and secure a license plate paying the sum of $3.00 therefor (Section 46.1-149 (8)). In addition thereto evidence of insurance must be filed with the Division of Motor Vehicles pursuant to Section 46.1-167.1 or the "Uninsured Motorist Fee" of $20.00 paid.

MOTOR VEHICLES—Insurance—DMV May Accept Carrier's Notice in Lieu of Requiring Security of Operator. (155)

November 16, 1959

HONORABLE C. H. LAMB, Commissioner
Division of Motor Vehicles

This is to acknowledge receipt of your letter of November 9, 1959 in which you request my interpretation as to the provisions of Section 46.1-450 of the Code as it relates to a particular situation. The question raised by you is as follows:

"In a case where an accident results only in property damage, is this Division authorized under Section 46.1-450 of the Code, particularly paragraph (c) thereof, to accept the notice of policy provided for in Section 46.1-451 in the event that the limits of the liability policy per-
taining to property damage are the same as prescribed in Section 46.1-450, but the limits of liability in the policy pertaining to personal injury are less than those prescribed by said section, for the purposes of eliminating the suspension required under Section 46.1-449 of the Code?"

The question is answered in the affirmative. Under the provisions of Section 46.1-449, the Commissioner of the Division of Motor Vehicles must suspend the driving license and registration privileges of any person who was the operator of a motor vehicle involved in an accident unless the operator furnishes security sufficient in the judgment of the Commissioner to satisfy any judgment for damages resulting from the accident by or on behalf of the person aggrieved.

Section 46.1-450 provides in part:

"The provisions of § 46.1-449 shall not apply to:

"(c) An owner, operator or chauffeur if his liability for damages resulting from the accident is, in the judgment of the Commissioner, covered by any other form of liability insurance policy issued by an insurance carrier authorized to do business in this State or by a bond; provided, that every such policy or bond mentioned herein is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of fifteen thousand dollars because of bodily injury to or death of one person in any one accident and, subject to that limit for one person, to a limit of thirty thousand dollars because of bodily injury to or death of two or more persons in any one accident and, if the accident has resulted in injury to or destruction of property, to a limit of five thousand dollars because of injury to or destruction of property of others in any one accident." (Italics supplied)

The term "the accident" in this section refers to that term in Section 46.1-449. The security deposited pursuant to that section is for the benefit of the person damaged. Likewise the filing of the notice by the insurance carrier under Section 46.1-451 that there was a liability policy on the vehicle of the operator at the time of the accident inures to the benefit of the injured party. The liability insurance will satisfy any judgment in the favor of such aggrieved persons, just as the application of the security so deposited will satisfy such a judgment. Obviously there would be no reason or purpose for such an operator to file both security and evidence of liability insurance. Even if the policy does not have the prescribed limits for personal injury, it would none the less protect the operator against claims for property damage.

I am, therefore, of the opinion under the aforementioned circumstances that you are authorized to accept this notice of insurance filed by the insurance carrier in lieu of requiring the operator of the vehicle to file security.

MOTOR VEHICLE—Licenses—Dealer's License Plates May be Used for Demonstration or Sale Only. (136)

HONORABLE JOHN R. DUDLEY, Judge
Loudoun County Court

This is to acknowledge receipt of your letter of October 15, 1959 in which you ask whether or not dealer's license plates can be used under the following circumstances:
"A local motor vehicle dealer operates both a new car agency and a used car lot, and in addition operates a trailer court located to the rear of the automobile agency. It has come to the attention of this Court that this dealer is in the practice of placing a set of dealers' license plates on a used truck from his used car lot, and with such dealers' plates hauling loads of shale or gravel from a local quarry, which he is using as surface material, not only on the driveway around his automobile sales agency but also on the roadways in his trailer court."

Your attention is invited to Section 46.1-115 (a) which provides as follows:

"Such dealer's license plates may be used on motor vehicles, trailers and semitrailers owned by, or assigned to, duly licensed motor vehicle dealers or their authorized representatives for demonstration or sale. Dealers' license plates shall not be used on motor vehicles such as wrecking cranes or other service motor vehicles for the use or operation of which dealers charge or receive compensation." (Italics supplied)

The italicized portion of this section was added by the 1958 General Assembly when the Motor Vehicle Code was revised. For many years prior to that time the dealers or their authorized representatives could use the dealer's license plates on vehicles operated for any purpose. However, the 1958 amendment certainly makes it clear that dealer's license plates can now only be used for purposes of demonstration or sale.

I am, therefore, of the opinion that the dealer cannot lawfully use dealer's license plates on the vehicle for the purposes narrated above.

MOTOR VEHICLES—Licenses—Department of State Police May Repossess Plates. (146)

HONORABLE ALONZO BEAUCHAMP
Commonwealth's Attorney of Russell County

November 6, 1959

This is to acknowledge receipt of your letter of October 31, 1959 in which you inquire as to the authority of the State Police in suspending registration plates under Section 46.1-58 of the Code.

As you stated, this section empowers the Division of Motor Vehicles to suspend the registration of any motor vehicle when it has been determined by the State Police that the vehicle is not equipped with proper brakes, etc.

The Commissioner of the Division of Motor Vehicles has authorized the members of the State Police as his agents to act under this section for him. Enclosed herewith is a copy of Memo—1958—#3 issued by the Department of State Police. Therein is a copy of the letter of the Commissioner of the Division of Motor Vehicles of October 6, 1958.

I am also enclosing herewith a photostatic copy of the order of revocation issued in the case to which you refer. The procedure followed in such cases is this: The State Trooper repossesses the license plates and forwards them direct to the Division of Motor Vehicles together with the original order of revocation, giving the owner a receipt for the license plates. The Division of Motor Vehicles holds these plates until advised by the State Trooper that the vehicle meets the proper inspection requirements. Then the plates are returned to the owner. This procedure has been followed for many many years and to our
recollection the validity thereof has never been questioned. I see nothing that is constitutionally objectionable to this procedure as Section 46.1-61 of the Code grants the owner of the vehicle the right of appeal to any court of record having competent jurisdiction.

Enclosed herewith is copy of an opinion issued by my predecessor, The Honorable J. Lindsay Almond, Jr., on August 25, 1953 to the Honorable Burleigh W. Hamilton, Commonwealth's Attorney of Wise County to the effect that the members of the State Police can act under this section as agents of the Commissioner of the Division of Motor Vehicles. This opinion is found in the Annual Report of the Attorney General, 1953-1954, Page 134.

I note that you state that the license tags belong to the owner. I call your attention to Section 46.1-102 to the effect that it provides that license plates remain the property of the Division of Motor Vehicles.

MOTOR VEHICLES—Licenses—Not Required of Non-Resident Who Lives on Virginia Side of Potomac River, but Beyond the Low Water mark. (317)

HONORABLE FERDINAND F. CHANDLER
Commonwealth’s Attorney for Westmoreland County

This is to acknowledge receipt of your letter of April 13, 1960 in which you state in part:

"Is a non resident owner of an automobile, who lives on a pier on the Virginia side of the Potomac River, but on the Maryland side of the low water mark, and who keeps his automobile when not in use, on the said pier, required to registered his said automobile under Virginia law with the Virginia Motor Vehicle Department?"

Pursuant to the Compact of 1785 between Virginia and Maryland, the territorial boundary of Virginia extends only to the low water mark of the Potomac River on its southern or Virginia shore. This office has heretofore expressed the opinion that Virginia does not have general criminal jurisdiction over the waters of the Potomac River. The concurrent jurisdiction extended the Commonwealth by the Compact has to do only with offenses committed against the person. (Annual Report of the Attorney General of Virginia, 1944-1945, Page 91)

A person living on a pier located on the Virginia shore, but beyond the low water mark would reside within the territorial limits of the State of Maryland and would be a resident of that state.

Under the terms of the Reciprocal Agreement now existing between the states of Virginia and Maryland, reciprocal privileges are extended to the owners or operators of privately owned motor vehicles licensed in Maryland unless they maintain continuous residence for a period of thirty days or more in Virginia during gainful employment. The crux of the matter revolves around the question of whether this person is a resident of Maryland within the meaning of the said agreement. In order to enjoy the reciprocal privileges, he would have to be a nonresident of Virginia and a resident of Maryland. From what you state, it is assumed that the vehicle is garaged on the pier. This being the situation, the conclusion is inescapable that he is a resident of Maryland. A copy of the said Reciprocal Agreement is enclosed.

I am, therefore, of the opinion that if this person who lives on the pier and garages his automobile thereon, same being duly registered in Maryland,
he can drive the same upon the highways of Virginia without the necessity of having it licensed in Virginia.

MOTOR VEHICLES—Licenses—Operator—Revocation of by Commissioner—
May Not be Revoked for "Aiding and Abetting" Another in Driving Under
the Influence Unless Licensee Convicted of Violating § 18-75 or § 46.1-417.

(12)

On May 12, 1959, Mr. Riggin presented the following question to Mr. Tyler:

"Attached find Abstract of Conviction in the Circuit Court of Appomattox County, showing the conviction of Chandler W. Wilson, 218 Federal Street, Lynchburg, Virginia, on April 7, 1959 of 'aiding and abetting his wife in operating a motor vehicle while under influence of intoxicants.' Since the offense charged to the wife was a misdemeanor, do we have any authority to revoke the privilege of the husband for aiding and abetting the misdemeanor?"

Copies of the record in the Circuit Court, as well as a copy of the order entered by the Circuit Court of Appomattox County on April 7, 1959, have been presented and examined.

It appears that on the 9th of March, 1959, Lucille Conner, a Justice of the Peace in Appomattox County, issued a warrant against Chandler White Wilson upon three charges, as follows:

1. Allowing an unlicensed person to operated a motor vehicle.
2. Driving under the influence of intoxicants.
3. Did aid and abet his wife Barbara Wilson in operating a motor vehicle while under the influence of intoxicants.

The accused was convicted in the county court on the third charge—that is, of aiding and abetting his wife Barbara Wilson in operating a motor vehicle while under the influence of intoxicants. From this conviction Wilson appealed and upon appeal the court found him guilty of the charge of aiding and abetting his wife in the operation of a motor vehicle while under the influence of intoxicants.

Additional information establishes that the accused was the owner of the car and was riding with her at the time of his arrest.

The defendant Wilson was not convicted of any violation of any of the provisions of Section 18-75 of the Code, nor of any of the offenses set forth in Section 46.1-417 of the Code. Under this latter section the Commissioner of Motor Vehicles is required to revoke the license of a person convicted for violation of the provisions of Section 18-75. It is not claimed that the Commissioner of Motor Vehicles would have the right to revoke this license under any other provisions of law. There is no statutory authority under which the Motor Vehicle Commissioner may revoke the license of a person who has been found guilty of aiding and abetting another who is driving under the influence of intoxicants.

I am of the opinion, therefore, that the Commissioner of Motor Vehicles does not have authority to revoke the license of this defendant under the circumstances existing. If the license has been revoked, it should be restored promptly.
HONORABLE W. FRANCIS BINFORD, Judge
Prince George County Court

This is to acknowledge receipt of your letter of January 8, 1960 in which you request my opinion as to the interpretation of certain provisions of the Motor Vehicle Code. The question will be answered seriatim:

1. Is a saw mill operator who owns and operates a self-propelled log loader, rebuilt from an Army jeep, over the highways from site to site exempt under Section E, of Section 46.1-45 from purchasing a license for said vehicle and is he further exempt under 46.1-352 from obtaining a driver's license?

ANSWER: The answer to both of these questions is in the affirmative. As you point out, the pertinent portion of Section 46.1-45 is paragraph (e) which reads as follows:

"(e) The exemptions contained in this section shall also apply to any farm or other tractor, trailer, log cart or similar vehicles owned by a sawmill operator when operated on a highway while being moved from one site to another, or being taken to or from a repair shop for repairs, or while crossing a highway from one contiguous tract of land to another."

I believe that the log loader made from an army jeep comes in the category of "similar vehicles owned by a sawmill operator."

Section 46.1-352 reads as follows:

"No person shall be required to obtain an operator's or chauffeur's license for the purpose of driving or operating a road roller, road machinery or any farm tractor or farm machinery or vehicle defined in § 46.1-45, temporarily drawn, moved or propelled on the highways." (Italics supplied)

This statute would exempt the operator of such a vehicle from obtaining a driving license.

2. Does the type of machinery, etc., defined in the above two sections have to be inspected if it is an exempt vehicle?

ANSWER: The answer to this question is in the negative. Section 46.1-316 provides:

"For the purpose of this section, a 'log trailer' shall be any vehicle designed and used solely as an implement for hauling logs, lumber or other forest products from the forest to the mill or loading platform. A log trailer as defined in this section shall be exempt from the requirements of § 46.1-315 if the operation on the highways of this State does not exceed two miles and is made during daylight hours."

Section 46.1-315 is the section requiring the annual inspection of motor vehicles. Hence, if this log loader is used during daylight hours in an operation on the
highways not exceeding two miles hauling forest products to the mill, the same is not required to be inspected. All other vehicles defined and referred to in the above mentioned sections (46.1-45 and 46.1-352) are not required to be inspected, as they are expressly exempted from the inspection requirement in the proclamation made by the Governor issued pursuant to Section 46.1-315 of the Code. In this connection, I refer you to Page 294 of the Report of the Secretary of the Commonwealth 1958-1959.

3. Does the word “site” mean a conventional saw mill site where several hundred thousand board feet would be manufactured or is site to be construed as any log operation where it becomes necessary to move a log loader to load said logs on trucks, etc., over the public highways in the orderly course of the business of logging?

ANSWER: I believe that the word “site” is broad enough to include in addition to the “conventional saw mill site” as you describe, any place where it is necessary to load logs on a truck. However, I believe the statute contemplates that it will be necessary to load more than a single log to come within this definition. This statute is designed to permit the limited operation of certain classes of vehicles on the highways without license.

MOTOR VEHICLES—Licenses—Reciprocal Interstate Agreements—Commuters. (48)

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney of Loudoun County

August 6, 1959

This is to acknowledge receipt of your letter of August 4, 1959 in which you request my opinion in reference to the requirements of licensing privately owned motor vehicles used by employees on the Chantilly airport project. The information furnished you indicates that these employees work on this job spending several nights in Virginia and several nights at their home each week and in some instances employees may spend the majority of their nights at home, while others may spend the majority of their nights in Virginia going home only on the week-ends.

The operation on the highways of Virginia of a motor vehicle registered in a foreign jurisdiction is a matter of grace and not of right. Reciprocity is never extended to residents. Article 7, Title 46.1 (Sections 46.1-131 through 46.1-139, Code of Virginia, as amended) covers the subject of registration by nonresidents. A nonresident is defined by Section 46.1-1 (16). That section provides that a person who becomes gainfully employed for a period exceeding sixty days is a resident within the meaning of the motor vehicle laws. Reciprocity is extended by statute in the aforesaid article or by reciprocal agreements either made by the Commissioner of the Division of Motor Vehicles under Section 46.1-137 or the Governor upon the advice of the Reciprocity Board pursuant to the provisions of Section 46.1-20. The reciprocity extended by such agreements supersedes the reciprocity extended by the statute. There is no prescribed form or manner in which these agreements are to be formulated or executed. Reciprocal privileges may be extended by informal agreements. *Atlantic and Danville Railroad Company v. Hooker*, 194 Va. 496.

From what you state, I assume that these employees come from the adjoining states, Maryland, West Virginia and the District of Columbia. Virginia has a reciprocal agreement dated the 20th of December 1957 with thirteen other states,
including Maryland and West Virginia. In that agreement the following pertains to the operation of passenger cars:

"II PASSENGER CARS

"Privately owned and operated passenger cars licensed by any one of the reciprocating States shall be permitted to operate freely between the several States, provided, however, that continuous residence for a period of thirty days or more during gainful employment, or sixty days in Indiana, shall constitute the establishment of a legal residence for the purpose of motor vehicle registration; except that members of the Armed Forces temporarily assigned in any one of the reciprocating States shall be extended full reciprocal privileges for the period of such registration, and further except: (Italics supplied)

"(a) Under Florida law persons when gainfully employed, or when placing minor children in the public schools of the State shall be required to register their passenger car."

You will note that the so-called "sixty days gainful employment provision" in Section 46.1-1 (16b) defining a resident, has been reduced to a period of thirty days of "continuous residence." A person who commutes from his home in one state to a point of employment in another either daily or on week ends does not establish a continuous residence within the meaning of this clause of the reciprocal agreement. Of course, if the employee would remain in Virginia for a period of thirty days continuously, he would be required to have his car registered in Virginia.

The arrangement that Virginia has with the District of Columbia concerning the reciprocity of motor vehicles is contained in a letter dated September 24, 1957 from the Honorable C. F. Joyner, Jr., Commissioner of the Division of Motor Vehicles, to the Honorable George E. Keneipp, Director of the Department of Vehicles and Traffic, Washington 1, D. C. I quote from that letter:

"2. District of Columbia vehicles are permitted to operate in intrastate commerce in the territory adjacent to the District (Arlington and Fairfax Counties and Alexandria) under District of Columbia license tags so long as such vehicles are garaged as many as four nights a week in the District of Columbia and the same privilege extended to Virginia vehicles operating in the District of Columbia, with the understanding that this arrangement applies only to private passenger vehicles and private commercial vehicles and that it does not apply to common carrier and contact carrier vehicles that are operated intrastate in either jurisdiction."

It is clear that if any of these employees have their automobiles licensed in the District of Columbia and remain as many as four nights in Virginia in any week, they must have their vehicles registered in Virginia.

I am, therefore, of the opinion that these employees working on the Chantilly airport project who have their cars registered in any of the states which are parties to the said reciprocal agreement are not required to register their vehicles in Virginia so long as they commute from their homes either daily or on week-ends. Furthermore, if the cars of said employees are registered in the District of Columbia they are required to be licensed in Virginia if the cars are garaged (remain) for as many as four nights in any week in this State.

For your information, I am enclosing copy of the so-called reciprocal agreement of the 20th of December 1957 which Virginia has with thirteen other states.
REPORT OF THE ATTORNEY GENERAL

MOTOR VEHICLES—Licenses—Taxes—Powers of Counties—Buses. (141)

HONORABLE D. CARLETON MAYES
Commonwealth's Attorney for
Dinwiddie County

October 28, 1959

This is in response to your letters of October 6 and 16, 1959, in which you ask if Dinwiddie County is vested with the authority to impose a county motor vehicle license tax on certain buses owned and operated by Maitland Brothers Charter Bus Service. Maitland's central office, where the buses are garaged, is located in Dinwiddie County. Maitland operates buses over:

1. Scheduled bus routes in Petersburg, Virginia.
2. Scheduled bus routes from Petersburg to points and places within Dinwiddie County.
3. Scheduled bus routes between cities and towns located within Dinwiddie County.

Maitland also owns other buses which are used exclusively for charter bus service. You advise me further that no city or town motor vehicle license tax has been paid by Maitland.

Section 46.1-66(a)(6) is controlling herein and reads as follows:

"(a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

"(6) The motor vehicle, trailer or semitrailer is operated by a common carrier of persons or property operating between cities and towns in this State and not in intracity transportation or between cities and towns on the one hand and points and places without cities and towns on the other and not in intracity transportation;"

I am constrained to believe that the County of Dinwiddie may levy a motor vehicle license tax as provided for by § 46.1-65(a) on those buses owned and operated by the Maitland Brothers Charter Bus Service which do not come within the exception set forth in § 46.1-66(a)(6).

I am of the opinion that those buses employed on scheduled routes which operate within the City of Petersburg, Virginia, and those buses which operate on scheduled bus routes within the City of Petersburg to points and places without the City of Petersburg do not come within the exception set forth in § 46.1-66(a)(6). The County is not authorized to levy a motor vehicle license tax on those buses which are operated between Petersburg, Virginia, and other cities and towns in Dinwiddie, and not in intracity transportation, as they come within the aforementioned exception. Moreover, the County is not authorized to impose a motor vehicle license tax on those buses operated between cities and towns in Dinwiddie County and not in intracity transportation. Those buses which are used exclusively for charter bus service or having no fixed and definite operating routes, in my opinion, fail to come within the exception.

MOTOR VEHICLES—Operating Under Influence Need Not be Committed on a Public Highway. (106)

HONORABLE BERNARD MAHON
Commonwealth's Attorney for
Caroline County

September 30, 1959

This is to acknowledge receipt of your letter of September 25, 1959 in which
you ask whether or not the holding in the case of *Prillaman v. Commonwealth*, 199 Va. 401, affects the opinion of this office rendered on July 25, 1950 in which it was stated that the offense of drunk driving, that is, the violation of Section 18-75 of the Code of Virginia, need not be committed on a public highway.

As you state, the *Prillaman case* held that a person did not violate the section of the Code which prohibits a person driving upon a highway after his driving license is revoked, when that person drove a motor vehicle on the premises of a filling station. The main question presented in the *Prillaman case* was what constituted a highway within the meaning of the Motor Vehicle Code and the Operators' and Chauffeurs' License Act. That decision did not touch on the question of drunk driving.

I am, therefore, of the opinion that the said opinion issued by this office on July 25, 1950 is not altered by the decision in the *Prillaman case, supra*, and is a correct statement of the law in which I concur.

MOTOR VEHICLES—Registration—Farm Machinery and Vehicles—Distance Within Exemption. (239)

February 16, 1960

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth's Attorney of Appomattox County

This is to acknowledge receipt of your letter of February 9, 1960 in which you request my opinion as to the interpretation of Section 46.1-45 of the Code of Virginia as amended.

The pertinent portion of the aforesaid section is as follows:

"(a) No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, pursuant to the provisions of this chapter, for any truck upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee of the truck or for any motor vehicle, trailer or semi-trailer, which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof, irrespective of whether or not the tracts adjoin, provided that the distance between the points shall not exceed ten miles, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs. The foregoing exemption from registration and license requirements shall also apply to any vehicle hereinbefore described or to any farm trailer owned by the owner or lessee of the farm on which such trailer is used, when such trailer is used by the owner thereof for the purpose of moving farm produce and livestock from such farm along a public highway for a distance not to exceed ten miles to a storage house or packing plant, when such use is a seasonal operation.

"(b) The exemptions contained in this section shall also apply to farm machinery and tractors; provided further that such machinery and tractors may use the highways in going from one tract of land to another tract of land regardless of whether such land be owned by the same or different persons. * * * *"
I shall answer your questions seriatim:

(1) Does a farmer who owns the usual farm equipment including a farm wagon which farmer also owns a jeep have to buy a motor vehicle license tag for his jeep if he uses the jeep only to pull farm equipment?

ANSWER: This question must be answered in the negative. It will be noted that the statute exempts any motor vehicle when it is used exclusively for agricultural purposes so long as the distance travelled upon the highway between the areas owned or leased by the farmer, does not exceed a distance of ten miles. Under these circumstances, a jeep does not have to be licensed.

(2) If the farmer purchases a motor vehicle license tag for his jeep, is it improper for him to use the jeep in pulling farm equipment, including his farm wagon, out on the highway?

ANSWER: It is not improper for him to use the jeep in this manner. Farm machinery, including the farm trailer, comes within the exemption of the statute. The farm tractor or wagon must be used for the purpose of moving farm produce or livestock. Farm machinery may be moved to a repair shop. The distance is limited to ten miles.

(3) If it is proper under either of the above circumstances for the (farmer) to use his jeep in pulling and moving his equipment from place to place is there any limit on the distance that he can go from his home or farm and if there is a limit (as I understand the law, it is ten miles) after he has operated at a point ten miles from his home for a day or so can he then extend the area in which he can pull his farm equipment an additional ten miles?

ANSWER: It will be noted that the limitation of distance applies between points on the owner's land or land leased by him. It would follow so long as the distance between the properties owned or leased do not exceed ten miles, the vehicle comes within the exemption. For instance, suppose the farmer leased or owned three parcels of land designated as Tract A, Tract B and Tract C. If Tract B is within ten miles distance from Tract A and Tract C, then the exemption applies although the distance between Tract A and Tract C is greater than ten miles.

MOTOR VEHICLES—Registration—Farm Vehicle Exemption May be Applied to "Jeep." (372)

HONORABLE JOHN R. DUDLEY, Judge
Loudoun County Court

June 3, 1960

This is to acknowledge receipt of your letter of May 31, 1960 in which you ask my opinion as to whether a motor vehicle used in the manner hereafter described is exempt from being licensed under Section 46.1-45 of the Code of Virginia as amended. I quote from your letter:

"* * * the owner of two farms less than ten miles apart, owns a 'jeep' which he uses for transportation on the farm and occasionally he uses it as an auxiliary small tractor for towing light loads. The
REPORT OF THE ATTORNEY GENERAL

"jeep" in question is not a pick-up truck, but is the small four passenger vehicle of the type widely used by the Armed Forces."

The pertinent portion of Section 46.1-45 is as follows:

"No person shall be required to obtain annual registration certificate and license plates * * * for any motor vehicle, trailer or semitrailer, which is used exclusively for agricultural * * * on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose than for the purpose of operating it across the highway or along the highway from one point of the owners' land to another part thereof, irrespective of whether or not the tracts adjoin, provided that the distance between the points shall not exceed ten miles * * *" (Italics Supplied)

It will be noted that the exemption is not confined simply to a truck, but to any motor vehicle as long as it is used for agricultural or horticultural purposes, et cetera. I am, therefore, of the opinion that the jeep automobile which is used in the manner described by you is not required to be licensed by the owner.

MOTOR VEHICLES—Registration—Tractors; When Required. (331)

May 2, 1960

HONORABLE ERNEST P. GATES
Commonwealth's Attorney of
Chesterfield County

This is to acknowledge receipt of your letter of April 22, 1960 requesting an opinion to the following question:

"Please advise me whether a tractor with a back hoe attachment used by the owner for digging septic lines and drainage ditches, not designed for farm use, should be registered under the provisions of Section 46.1-41 of the Code of Virginia, or exempt from registration under the Motor Vehicle Laws of the State. If required to be registered what type of license should be issued by the Division of Motor Vehicles?"

Section 46.1-47 provides that farm tractors need not be registered, however, we find the term "farm tractor" defined in Section 46.1-1 (7) as follows:

"Every motor vehicle designed and used primarily as a farm, agricultural or horticultural implement for drawing plows, mowing machines and other farm, agricultural or horticultural machinery and implements." (Italics supplied)

It would follow that the exemption from registration would only apply where the tractor is used for agricultural or horticultural purposes. This tractor with the back hoe attachment is a type of vehicle which can be licensed under the provisions of Section 46.1-43 of the Code which section provides that the Commissioner of the Division of Motor Vehicles may in his opinion where it is equitable, grant a temporary registration for the operation of tractors upon the highways. Under said section, the license is granted upon the payment of the fee of ten cents per mile traveled over the highways. Where a tractor (not used for agricultural purposes, etc.) is used to pull a trailer, the combination must be licensed under the provisions of Section 46.1-154 of the Code.
MOTOR VEHICLES—Unlicensed Vehicles of Dairy Farmers—May Not be Driven on Highways to Haul Sawdust to Property of Others. (255)

Mr. F. W. Simpson
Sheriff of Powhatan County

This is to acknowledge receipt of your letter of February 26, 1960 in which you inquire as to whether dairy farmers can use their unlicensed equipment (motor vehicles) upon the highways to haul sawdust from a sawmill site on property not owned or leased by them to their own farms.

Section 46.1-45 of the Code provides that such unlicensed equipment can be used on the highways from points on the owner's land to points on tracts that are either owned or leased by the farmer. In order to come within the exemption, a taxpayer must show that he comes within the four corners of the exemption. Such statutes granting exemptions are strictly construed against the taxpayer who would be otherwise liable.

Under the circumstances, it is my opinion that the farmers which you mention in your letter do not come within the exemption and, therefore, cannot lawfully drive their unlicensed vehicles on the public highways for such a purpose.

MOTOR VEHICLES—Used for Agricultural Purposes—When Registration Required. (350)

Honorable W. Earle Crank
Commonwealth's Attorney of Louisa County

This is to acknowledge receipt of your letter of May 11, 1960 in which you request my opinion as to whether a motor vehicle used exclusively for agricultural purposes may be used by a farmer to haul shavings from a planing mill to his farm to be used for bedding animals can be driven upon the highways without being licensed.

The pertinent portion of Section 46.1-45 is:

"(a) No person shall be required to obtain the annual registration certificate and license plates or to pay the fee prescribed therefor, pursuant to the provisions of this chapter, for any truck upon which is securely attached a machine for spraying fruit trees and plants of the owner or lessee of the truck or for any motor vehicle, trailer or semitrailer, which is used exclusively for agricultural or horticultural purposes on lands owned or leased by the owner thereof and which is not operated on or over any public highway of this State for any other purpose other than for the purpose of operating it across a highway or along a highway from one point of the owner's land to another part thereof, irrespective of whether or not the tracts adjourn, provided that the distance between the points shall not exceed ten miles, or for the purpose of taking it or other fixtures thereto attached, to and from a repair shop for repairs. * * *" (Italics supplied)

In the case you cite, there is no question that the vehicle is used for agricultural purposes; however, you do not state whether the farm or tract of land where the planing mill is located is owned or leased by the farmer (owner of the motor
vehicle) nor do you indicate the distance between the farm and the planing mill site. Both of these conditions must be met before the motor vehicle could be exempt from taxation.

I am enclosing herewith copy of an opinion which was issued by this office on March 2, 1960 to the Sheriff of Powhatan County relative to the same subject.

MOTOR VEHICLES—Weights—Permits for Nonconforming Vehicles Previously Registered—Annual Permit Period Reasonable. (83)

Honorable William E. Fears
Commonwealth's Attorney for Accomack County

September 11, 1959

This is in reply to your letter of August 31, 1959, in which you advise that the Circuit Court of Accomack County has requested the view of this office regarding the legal authority for the limitation of one year on permits issued by the Virginia Department of Highways pursuant to Section 46.1-339, Code of Virginia of 1950 as amended.

The permit which you enclosed with your letter was issued to T. Lee Byrd and Sons for a 1956 GMC, 3-Axle Single Unit Vehicle, License No. 140-240, and authorized the operation of such vehicle with maximum weight limits as were permitted by the law in effect on January 1, 1956. The date of issuance was April 22, 1957, and the expiration date was April 15, 1958.

I am advised by agents of the Department of Highways that the permits issued pursuant to this section are so dated as to expire simultaneously with the annual license issued by the Division of Motor Vehicles for such vehicle. The purpose, of course, is manifest, since some method of identifying the vehicles exempted from current statutory weight limitations is essential to the effective administration of the statutes.

Section 46.1-339 of the Code, providing for issuance of special permits, is silent as to the contents thereof. I am aware of no general statute which specifies the contents of a permit to be issued by an administrative agency. Since no statutory guide has been provided by the General Assembly for the preparation of such a permit, it would appear to be a justiciable question as to whether the provisions written into the permit are a reasonable exercise of the powers and duties imposed on the administrative agency for the issuance of such permits.

I am of the opinion that the requirement for annual reissuance of such a special permit is reasonable, since there is no more effective way of keeping a record of this special group of vehicles which may continue to operate under a repealed statute so long as such vehicles remain in operating condition.

MOTOR VEHICLES—Weights—Truck-Trailer Combination—Each Vehicle Must be Licensed for Total Gross Weight. (118)

October 12, 1959

Honorable Ernest W. Goodrich
Commonwealth's Attorney of Surry County

This is to acknowledge receipt of your letter of October 7 in which you state:
"One of the State troopers has given a ticket to the operator of a pickup truck which was licensed for 10,000 pounds, which truck was pulling a trailer likewise licensed for 10,000 pounds, for being overweight, the total weight of the two units and load being 14,000 pounds. In other words, the question is whether or not the pickup truck which was pulling the trailer would have to be licensed for the total amount of the weight of the two vehicles plus their load, just as required of tractor trailer units."

I refer you to Section 46.1-154 of the Code which reads as follows:

"Except as hereinafter otherwise provided, the fee for certificates of registration and license plates to be paid by owners of all motor vehicles, trailers and semitrailers not designed and used for the transportation of passengers shall be determined by the gross weight of the vehicle or combination of vehicles of which it is a part, when loaded to the maximum capacity for which it is registered and licensed, according to the schedule of fees herein set forth. For each thousand pounds of gross weight, or major fraction thereof, for which any such vehicle is registered and licensed there shall be paid to the Commissioner the fee indicated in the following schedule immediately opposite the weight group and under the classification established by the provisions of § 46.1-99 (b) into which such vehicle, or any combination of vehicles of which it is a part, falls when loaded to the maximum capacity for which it is registered and licensed; provided, that in no case shall the fee be less than twelve dollars. (Italics supplied)

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The truck and trailer make up what is known as a truck-trailer combination and each of the vehicles of course is part of the combination. The license fee must be determined from the gross weight of the combination. In applying for a license, the owner must indicate the gross load for which he desires the vehicle licensed. Upon paying the required fees and obtaining a license the owner is privileged to carry a load to the extent indicated. Whether he does or does not carry such a load is of no concern to the commonwealth. In this particular case, each of the vehicles is licensed for a potential load limit of 10,000 pounds or a combined total limit of 20,000 pounds. Therefore, the same would fall into the 20,000 pounds weight group. Each vehicle must be licensed by paying the fee on the basis of that weight group. Hence, the truck having been licensed for 10,000 pounds, the fee charged therefor would be $2.60 times 10 or $26.00 (provided the owner is a private carrier). Likewise the trailer, having been licensed for 10,000 pounds, the fee charged therefor would be $2.60 times 10 or $26.00. Hence, the total amount that should have been paid for licensing these vehicles so that they could operate at a gross weight of 20,000 pounds would be $52.00. If the vehicles have been separately licensed for 10,000 pounds each, the owner has paid only $12.00 for each of the vehicles or a total of $24.00
I am, therefore, of the opinion that the owner has not paid the required registration fee.

NATIONAL GUARD—Active Duty—Missile Sites—Police Powers. (158)

MAJOR GENERAL SHEPPARD CRUMP
The Adjutant General

November 19, 1959

This is in reply to your recent letter in which you asked my opinion of the legality of each of three suggested procedures involving the arming, for interior guard duty purposes, of personnel manning certain missile firing facilities in the Washington and Hampton air defense areas. Each site is manned by twenty-four individuals who are civilian employees of the United States and members of the Virginia Army National Guard.

I understand that title to the real estate contained in each of the twelve 10-15 acre parcels is in the United States but that no jurisdiction over such areas has been ceded by Virginia or accepted by the federal government.

You advance three proposals in lieu of our previous informal suggestion that these men be appointed conservators of the peace pursuant to § 18-17, as amended, of the Code of Virginia. Your proposals are:

(1) "Unarmed guards able to call civilian police when required.
(2) "One license [appointment as conservator or deputy sheriff, etc.] to cover all individuals in an area. This would require a total of six licenses.
(3) "The Governor to call the necessary National Guardsmen into active service under Article 7, Title 44, Code of Va. 1950."

Proposal No. (1) above is quite legal, but I do not believe it will completely serve the purpose. The guards are posted on site to protect the missiles, launchers, communication equipment, etc., from sabotage, theft and other interference. It might become quite difficult to successfully perform this mission, without firearms, in the event of a raid or other activity by a group of individuals seeking to damage or destroy the material installed at the site.

I am unable to find any statutory authority for the issuance of "blanket" appointments or commissions as conservator of the peace. Under the provisions of § 18-17 of the Code, the court of record, within the jurisdiction of which the missile site lies, first determines that the "place" is "essential to national and State defense" and then, upon application "of anyone alleging that it should be specially policed in such interest, may "appoint one or more citizens of the Commonwealth conservator or conservators of the peace" to serve for a period not to exceed one year, with jurisdiction extending within limits prescribed in the order of appointment. The statute in question does not specify that a bond will be required of such appointees of the court as is required of policemen appointed under § 18-19 of the Code. It may be that the judges of the court or courts of record concerned would appoint all the twenty-four men of each detail in one order upon proper application to the respective courts.

With regard to whether the Governor should call the necessary National Guardsmen to active service under Article 7, Title 44, of the Code, I am of the opinion that none of the conditions prerequisite to such a call exist. Section 44-75 authorizes the Governor to call forth the militia in the event of extraordinary threat to orderly execution of the laws of the Commonwealth and in the event of natural disester, while § 44-78 provides for a call by local civil authorities in the event of riot, tumult, etc., but the plain language of the two Code sections does not contemplate a call of the militia to active duty in order to guard defense installations unless a major threat thereto is imminent.
Although § 18-15 of the Code provides that “if a person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property, he may be required to give a recognizance,” I do not feel that this sanction is applicable to an individual guarding military property while under arms. It follows that there is no statutory prohibition against the personnel assigned to any particular missile site performing interior guard duty under arms, although their power of arrest will be limited to that of a citizen apprehending another who is committing a felony in his presence.

In the event of a guard wounding an intruder, the tort liability of the National Guardsman should be considered. It is probable that, since the guard is a federal employee, the Federal Tort Claims Act would be applicable, provided the intruder was assaulted (wounded) by a guard who was acting within the course and scope of his employment at the time of the incident. I would suggest that inquiry be made of the National Guard Bureau on this point.

It is to be noted that 40 U.S.C.A., § 318 gives to the Director of the Federal General Services Agency the power of appointment of uniformed guards employed by the government as special policemen for the protection of buildings and places under the jurisdiction of the agency. It may be that the Secretary of Defense has similar powers or could be granted the same. Again, the National Guard Bureau should have the information available.

Finally, § 52-23 of the Code of Virginia authorizes the Governor to appoint special State police officers, directly responsible to him, who are vested with the powers of sheriffs of counties and police officers of cities and towns. Section 52-24 provides that these officers shall be paid such compensation as allowed by the Governor out of moneys appropriated for executive control of the State. However, these statutes apparently do not contemplate such action by the Governor in situations such as you present. At the same time, you might consider requesting legislation, in the form of an amendment to § 18-9 or an entirely new act, which will vest police powers in National Guard personnel serving as federal civil employees at missile sites.

NURSES—Advisory Council on Nursing Training—Qualification of Hospital for State Aid—Nursing School Must Comply with Statute. (163)
See Also—Hospitals.

HONORABLE D. V. CHAPMAN, JR.
Advisory Council on Nursing Training

This is in reply to your letter of November 23, 1959, in which you enclosed a copy of an application filed by Leigh Memorial Hospital, Incorporated, of Norfolk, Virginia, for State aid under the provisions of Chapter 23 of Title 32 of the Code of Virginia. To this application is attached copy of a letter written by Mr. J. B. Merritt, Administrator of the Hospital, to the Governor of Virginia. It appears from the application and the letter to the Governor that this facility is operated for the purpose of giving instruction in practical nursing.

Section 32-392(c) is as follows:

“‘Nursing school’ means a school approved by the State Board of Nurse Examiners for the education and training of professional nurses within this State and operated by, or in conjunction with, a hospital.”

It will be observed that the term “nursing school” as used in the statute under consideration is limited to schools approved by the State Board of Nurse Exam-
iners for the education and training of professional nurses. The qualifications of a professional nurse are set forth in Section 54-346 of the Code and are as follows:

"An applicant who desires to practice professional nursing shall furnish satisfactory evidence that she is at least twenty years of age, is of good moral character, has received sufficient preliminary education to meet the requirements fixed by the Board, and has graduated from a training school of a hospital giving practice in medical, surgical, obstetrical and pediatric nursing, either through and under the hospital organization or by affiliation, which training school maintains the standards required by the Board and gives at least two years' training in the hospital and systematic courses of instruction, and at which training school the applicant shall have attended at least eighteen consecutive months prior to graduation."

The qualifications of a practical nurse are set forth in Section 54-348 of the Code and are as follows:

"An applicant who desires to be licensed as a registered practical nurse shall furnish satisfactory evidence that she is at least eighteen years of age, is of good moral character, is in good physical and mental health, has completed at least the elementary grades in school or the equivalent thereof, and has successfully completed a period of not less than nine months of training for practical nursing under a program approved by the State Board of Examiners of Nurses."

The standards for obtaining approval for the operation of an accredited school for the training of professional nurses are set forth in Section 54-355 of the Code and the standards for approval of a school engaged in the training of practical nurses are set forth in Section 54-357 of the Code. Section 54-326 defines the term "practice of professional nursing" as follows:

"The term 'practice of professional nursing' means the performance of any professional service requiring the application of the principles of nursing based on biological, physical and social sciences, such as responsible supervision of a patient requiring skill in observation of symptoms and reactions and the accurate recording of the facts and carrying out of treatment and medications as prescribed by a licensed physician, and the application of such nursing procedures as involve understanding of cause and effect in order to safeguard the life and health of a patient and others."

This section also defines the term "registered practical nurse" in an entirely different manner. This latter definition is as follows:

"The term 'registered practical nurse' means any person licensed as such by the Board to perform such duties as are required in the physical care of a patient, and the carrying out of medical orders and directions given by a licensed physician which requires an understanding of practical nursing procedures but not the technical understanding necessary for professional service."

It is clear from these statutory provisions contained in Chapter 13 of Title 54 of the Code that the requirements necessary for a certificate to practice professional nursing are much more rigid than those that are required where the certificate is for practical nursing only.

It is clear from the definition of "nursing school" as contained in Section 32-392 of the Code that only those hospitals operating a school meeting this definition
can qualify for State aid. It is not contemplated under the "State Nursing Training Facilities Construction Act" that State aid shall be available to any hospital unless the nursing school comes within the definition of that term as used in said Act.

Therefore, in my opinion, the Leigh Memorial Hospital, Incorporated, does not qualify for State aid.

NURSES—Nursing Training Facilities Construction Act—Eligibility for Grant-In-Aid Allocation—Richmond Memorial Hospital. (215)

HONORABLE D. V. CHAPMAN, JR.
Executive Secretary,
Advisory Council on Nursing Training

January 19, 1960

This is in reply to your letter of January 15, 1960, which reads as follows:

"I have previously discussed with Mr. Kenneth C. Patty, of your office, and am now transmitting herewith material described in my letter of January 15, 1960, to Mr. Harold Prather, relating to the application submitted by the Richmond Memorial Hospital, Richmond, Virginia, to the Advisory Council on Nursing Training for a grant-in-aid allocation under the State Nursing Training Facilities Construction Act, Chapter 23, Title 32 of the Code of Virginia.

"Acting on request of the Chairman and on behalf of the Council, I would appreciate very much your opinion as to whether or not the aforementioned hospital, based on the above mentioned material, will, in this regard, be eligible for State aid with particular reference to Section 32-392 sub paragraph c, in effect requiring approval by the State Board of Nurse Examiners.

"I will be very glad to discuss any other details in which you may be interested in connection with the opinion we are requesting. Please return for the Council file, the data I am submitting for your review."

The application and other papers filed by the Richmond Memorial Hospital reveal that at the present time the Hospital does not operate a nursing school. The Hospital proposes to operate such a school as soon as a suitable facility can be constructed. You have called attention to paragraph (c) of Section 32-392 of the Code which defines "nursing school" as follows:

"'Nursing school' means a school approved by the State Board of Nurse Examiners for the education and training of professional nurses within this State and operated by, or in conjunction with, a hospital."

The material submitted by the Hospital contains an outline of its plan of organization which has been approved by the State Board of Nurse Examiners. The school expects to complete the facility in conformity with the plans and open its school in September of 1961.

The general duties of the Advisory Council on Nursing Training and the purpose of the program are set out in Section 32-393 of the Code as follows:

"(a) There is hereby established within the office of the Governor the Advisory Council on Nursing Training. The Council shall constitute the sole agency of the State for the purpose of (1) Making an inventory
of existing nurse training facilities, surveying the need for construction of additional nurse training facilities, and developing a program for the construction of nurse training facilities, (2) Developing and administering a State plan for the construction of nurse training facilities in conjunction with public and nonprofit hospitals.

“(b) The Governor may assign to any agency within his office all or any part of the duties imposed upon the Council by this chapter.”

One of the duties prescribed in this section is “developing a program for the construction of nurse training facilities” which, of course, must be approved by the State Board of Nurse Examiners as required by Section 32-392. These sections (32-392 and 32-393) when considered together, along with the manifest purposes of the statute, imply that it is not necessary that a nursing school must be in actual operation in order to qualify for State aid.

I am of opinion, therefore, that the Council has authority to approve the application filed by Richmond Memorial Hospital.

ORDINANCES—Penalty Prescribed May Exceed Statute in Certain Cases.
(138)

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

October 23, 1959

This is in reply to your letter of October 19, 1959, which reads as follows:

“Section 18-114 of the Code of Virginia provides ‘if any person arrived at the age of discretion profanely curse or swear or get or be drunk in public, he shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one nor more than ten dollars * * *’.

“Would a Town Ordinance of the Town of Christiansburg duly and regularly passed by the Council of said Town, making it a misdemeanor for a person to curse or swear or get or be drunk in public, and said ordinance providing upon conviction thereof shall be fined not less than five dollars nor more than twenty-five dollars, would said Town Ordinance be valid even though the penalty is greater than the State statute provides?

“Does any town ordinance duly adopted declaring a certain criminal act a misdemeanor, which said town ordinance follows the wording of the State statute as to the same criminal act and which said State statute declares said act to be a misdemeanor, unless the State statute makes a provision as it does in 18-131 ‘that town ordinances shall provide the same punishment for a violation thereof as is provided by this section * * *’, is the town ordinance void by reason of being in conflict with the State statute just because the fine provided in the town ordinance may be more than the fine provided in the State statute for the same offense, or the town ordinance provides for a jail sentence greater than the jail sentence provided by the State statute for the same offense?”

As you know, § 18-114, as amended, of the Code of Virginia, 1950, was designated as § 4368 of the Code of 1919. I find that a question similar to that posed by you was answered by the then Attorney General, Abram P. Staples, on May 20, 1936, in an opinion addressed to Honorable George S. Abbitt, Jr., then
substitute Trial Justice of Appomattox County. I enclose copy of that opinion which was published in the Report of the Attorney General, 1935-36, at page 43. This opinion concludes that town ordinances prescribing a heavier punishment for an offense than a general statute covering the same subject matter are not in conflict with the statute, but admits that the question is not free from doubt. Subsequently, in 1937, the Supreme Court of Appeals of Virginia upheld an ordinance of the City of Norfolk dealing with drunk driving which provided for a lesser penalty than that prescribed by § 4722 of the Code. Shaw v. City of Norfolk, 167 Va. 346, 189 S. E. 335. The Court said, at page 352 of 167 Va.:

“The general rule is that where a municipality has the power to legislate on the same subject with which the State has dealt by general law, in the absence of specific restrictions the ordinance will not be declared invalid merely because different penalties are prescribed in the ordinance from those prescribed by a general statute.”

And at page 353, quoting from Strubbers v. Sokol, 108 Ohio. St. 263, 140 N. E. 519, the Court stated:

“'A police ordinance is not in conflict with a general law upon the same subject merely because certain specific acts are declared unlawful by the ordinance which acts are not referred to in the general laws, or because certain specific acts are omitted from the ordinance but referred to in the general law, or because different penalties are provided for the same acts, even though greater penalties are imposed by the municipal ordinance.'”

As you point out, the statute in question, § 18-114 of the Code, specifically confers upon counties, cities and towns the power to adopt ordinances prohibiting and punishing the conduct and acts enumerated, without specifically restricting or limiting the punishment which may be imposed pursuant to such municipal enactments. This silence on the part of the Legislature was the subject of comment by the Court in Allen v. City of Norfolk, 195 Va. 844, 80 S. E. (2d) 605, on rehearing 196 Va. 177, 180, 83 S. E. (2d) 397. The most recent pronouncement of our Court is found in National Linen Service v. City of Norfolk, 196 Va. 283, 83 S. E. (2d) 405, a case involving two city ordinances and § 32-60 of the Code of Virginia. In holding the action of the City valid, the Court said, at page 285 of 196 Va.:

“The fact that the penalty for the violation of the two ordinances is greater than that provided for in the statute does not invalidate the ordinances. Allen v. City of Norfolk, 195 Va. 844, 80 S. E. (2d) 605, decided this day on rehearing.”

The question is the subject of an Annotation in 138 A.L.R., beginning on page 1208. The gist of this article is that some twelve states subscribe to the doctrine that if the penalty provided by the ordinance exceeds that set by the statute, then the ordinance is void to that extent, the theory being that the municipality, in adopting a higher penalty, is in effect amending state legislation without specific authority to prescribe a penalty in excess of the statutory limit. Some eight states are listed as subscribing to the opposite theory, that since the municipality is exercising police powers granted by its charter, it may set a higher maximum penalty. Logic would seem to dictate that if the General Assembly decides that a fine of from one to ten dollars is an adequate punishment for a crime, a municipal corporation could not say that the punishment shall be greater for violation of its ordinance which parallels the statute in all particulars except the amount of the fine.

I agree with the earlier opinion of this office that the matter is not free from
doubt, but, in view of the more recent pronouncements of our highest court, I am constrained to believe that the Christiansburg ordinance would not be declared invalid by reason of its penalty being set at a fine of five to twenty-five dollars.

ORDINANCES—Repeal—Publication—Requirements Must be Completed. (172)

November 30, 1959

HONORABLE HORACE T. MORRISON
Attorney for the Commonwealth for King George County

This is in reply to your letter of November 24, 1959, in which you state:

"At present we have a County Automobile Tax Ordinance of $5.00 annually. The Board of Supervisors has advertised for a public hearing at which the board has proposed to increase the tax of $5.00 to $10.00 annually. This public hearing is scheduled for December 3, 1959.

"The Board of Supervisors has asked me to request your opinion as to whether it would be legal for them to repeal this Ordinance at the hearing, such repeal to take effect at the end of the license year, to-wit: April 15, 1960.

"I am of the opinion that the board cannot repeal the Ordinance in its entirety except after they have advertised for a proposed repeal thereof."

I concur in your view that the County Board of Supervisors of King George County cannot repeal the county automobile tax ordinance without having complied with the provisions of § 15-8, as amended, of the Code of Virginia, prescribing the conditions under which a county governing body may adopt or amend such an ordinance. I infer that King George is one of the counties to which § 15-8 is applicable, rather than § 15-10.

Although you do not elaborate on the text of the advertisement for the public hearing scheduled for December 3, 1959, I presume that such advertisement did not include any language indicating that the Board of Supervisors was considering repeal of the ordinance in question, merely indicating that amendment of such ordinance would be considered.

It is apparent that the prescription by the General Assembly, in § 15-8 of the Code, of conditions under which ordinances providing for certain county taxes, including a motor vehicle license tax, shall be adopted is for the purpose of giving notice to the people of the county that they may be required to pay additional taxes or be relieved of taxes which they are now paying. These requirements of publication must be complied with not only in the adoption of the ordinances, but in repealing the same, since such an ordinance is a legislative act of the governing body of the county. If no notice of intention to repeal a tax ordinance in its entirety is given to the public, such ordinance should not be repealed by the Board of Supervisors.

PARENT AND CHILD—Support—Stepchild Not Required to Assist Step-parent. (92)

September 18, 1959

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth's Attorney for Appomattox County

This will reply to your letter of September 10, 1959, in which you inquire
REPORT OF THE ATTORNEY GENERAL

whether or not a stepchild can be compelled to assist in the support of his dependent stepmother under the provisions of Section 20-88 of the Virginia Code. In pertinent part, the statute in question prescribes:

"It shall be the joint and several duty of all persons sixteen years of age or over, of sufficient earning capacity or income, after reasonably providing for his own immediate family, to provide or assist in providing for the support and maintenance of his or her mother or aged or infirm father, he or she being then and there in necessitous circumstances.

"If there be more than one person bound to support the same parent or parents, the persons so bound to support shall jointly and severally share equitably in the discharge of such duty. * * *

I concur in the view expressed in your communication that the language of the statute italicized above "would not include a stepmother or a stepfather . . ." I have reviewed the authorities cited in your letter to the effect that a stepmother may be deemed a "parent" within the purview of certain statutes regulating the custody of dependent children and the distribution of life insurance proceeds; however, as the language of the initial paragraph of Section 20-88 expressly provides that the duty thereby imposed upon an individual shall be that of providing, or assisting in providing, for the support and maintenance of his or her "mother or aged or infirm father", I am of the opinion that the word "parents" appearing in subsequent provisions of the statute should be construed to embrace only those persons for whose support provision is specifically made in the opening sentence of the statute. Moreover, as the statute in question is criminal in character, it must be accorded a strict interpretation and not extended by construction. I am, therefore, of the opinion that Section 20-88 of the Virginia Code imposes no obligation upon a stepchild to assist in the support of his stepmother or stepfather.

PARK AUTHORITIES—County Authority May Convey Real Estate to Game Commission for Dam and Lake. (177)

HENRY C. MACKALL, ESQUIRE
Attorney at Law
Fairfax, Virginia

This is in reply to your letter of December 3, 1959, which reads as follows:

"I represent the Fairfax County Park Authority which was organized under the provisions of the Park Authorities Act, Section 15-714.1 et seq. The Authority has on hand certain funds given to it by the Board of County Supervisors of Fairfax County, Virginia, which are held pursuant to Section 15-714.8.

"The State Game Commission and the Park Authority have reached an agreement whereby the Authority will acquire with its funds a tract of land in Fairfax County which will then be deeded to the Game Commission which will construct a dam to flood all the property with the exception of a strip around the banks. The Commission will stock this lake for fishing and will provide maintenance and supervision. The Park Authority intends to retain title to other lands adjoining this lake which it will operate as a public park. Section 15-714.5(f) provides that the Authority may 'transfer or dispose of any property or interest therein acquired by it, at any time.'"
"Your opinion is requested as to whether or not the language 'transfer or dispose' would authorize the Park Authority to deed land to the State Game Commission without a monetary consideration."

Section 15-714.5(f) of the Code of Virginia, to which you refer, specifically authorizes and empowers each authority created under the Park Authorities Act "* * * to sell, lease as lessor, transfer or dispose of any property or interest therein acquired by it, at any time; * * *." Section 15-714.5(j) further authorizes and empowers each authority:

"To enter into contracts with the federal government, the Commonwealth of Virginia, any political subdivision, or any agency or instrumentality thereof, or with any unit, private corporation, copartnership, association, or individual providing for or relating to the furnishing of park services or facilities;"

I am of the opinion that the pertinent provisions of § 15-714.5 furnish ample authority for the Fairfax County Park Authority to sell or transfer the tract in question to the Commission of Game and Inland Fisheries in consideration of the Commission's agreement to construct a dam, stock the lake thus formed, maintain and supervise the same for the use of the public within the public park area.

PROBATION AND PAROLE—Probation Officers—Have Powers of Police Officers. (170)

HONORABLE L. MELVIN GILES
Commonwealth's Attorney for Pittsylvania County

November 30, 1959

This is in response to your letter of November 19, 1959, inquiring if a probation officer would be deemed a police officer or other peace officer under the provisions of Section 18-273, Code of Virginia.

Section 18-273 provides:

"Any person who shall falsely assume or exercise the functions, powers, duties and privileges incident to the office of sheriff, police officer, marshal, or other peace officer, or who shall falsely assume or pretend to be any such officer, shall be deemed guilty of a misdemeanor."

Section 53-278, pertaining to the powers, duties and status of probation officers, provides in the last sentence thereof, as follows:

"Every probation officer appointed under the provisions of this article shall have all the powers and authority of a police officer."

This office is of the opinion that the provisions of Section 53-278, specifically granting to every probation officer so appointed all the powers and authority of a police officer, would give such probation officer the status of a police officer under the provisions of Section 18-273, Code of Virginia.

PROCESS—Civil—Service by Officer—Powers. (208)

HONORABLE ROBERT B. DAVIS, Judge,
Municipal Court of the City of Bristol

January 13, 1960

This is in response to your letter of January 6, 1960, requesting the advice of this office in connection with the following questions presented:
1. "If the personnel of a manufacturing plant refuses to call an employee to the office of said plant for the purpose of having a duly constituted officer serve a civil process on the employee, is such action a violation of the statute referred to?

2. "If personnel of a plant advises a duly constituted officer desiring to serve a civil warrant on one of its employees in the plant that the officer will not be allowed to go into the plant and make a service of civil process, but that the officer is welcome to wait outside the entrance and serve such papers as he desires on the employee as he or she enters or leaves the plant, does the same constitute any violation of said Code section?

3. "If personnel of a plant has the right to refuse the officer admittance to the plant for the purpose indicated and/or has the right to refuse to make the employee available, then in event the officer does subsequently return to the plant premises after being instructed by plant personnel not to return, does the plant personnel have any right to have issued a warrant charging the officer with trespassing?"

In response to question No. 1, such action does not appear to be a violation of statute (Section 18-272, Code of Virginia), as there appears to be no requirement of law that the personnel of a manufacturing plant call an employee to the office of such plant for the purpose of having a duly constituted officer serve a civil process on the employee.

In response to the second question, there likewise appears to be no violation of the said statute as there appears to be no legal requirement that the employees or operators of a plant permit an officer to go into the plant for the purpose of serving a civil process upon an employee located in the plant.

In response to the third question, I am enclosing a copy of an opinion to Deputy Sergeant Houchins of Hopewell, in which this office ruled that an officer armed only with a civil warrant is not authorized to force his admittance into a factory or plant not owned by the defendant named in the warrant for the purpose of making service of a warrant upon an employee at the plant. Section 18-225 of the Code, it would seem, would be applicable to an officer unless such officer is armed with a process authorizing him to go upon the premises despite the objection of the owner thereof.

With respect to civil liability in such cases, there is authority to the effect that where an act of an officer, although perhaps an invasion of right, is of little importance and the injury resulting therefrom, if any, is trifling, the maxim that the law does not care for or take notice of very small or trifling matters may prevent a recovery.

PUBLIC HEALTH—Rabies Vaccine—May be Administered by Animal Owner or Employee of Owner. (262)

Drugs and Druggists—Rabies Vaccine—May be Sold Only to Licensed Practitioner. (262)

Counties—Boards of Supervisors—May Not Adopt Ordinance Requiring Administration of Rabies Vaccine Only by Licensed Veterinarian. (262)

HONORABLE MACK I. SHANHOLTZ
Commissioner, Department of Health

March 10, 1960

This is in reply to your letter of March 4, 1960, which reads as follows:

"Under Title 29 of the Health Laws of Virginia, Chapter 9, para-
graph 196; any county, city or town may adopt ordinances deemed necessary to prevent the spread of rabies within its boundaries.

"On December 1, 1959, the Board of Supervisors of Scott County, Virginia adopted a rabies ordinance which had been recommended by this Department. This ordinance required that the vaccination of dogs against rabies be done only by a licensed veterinarian. This is the usual procedure and there are many sound health reasons why this vaccination should not be attempted by a layman.

"The Board of Supervisors of that county has recently rescinded that part of the Scott County Ordinance prohibiting an individual from vaccinating his own dog or a dog belonging to some member of his immediate family.

"They took the attitude that the part of the section of their local ordinance prohibiting this practice applied to the chick-embryo grown, three year vaccine, but not to the old, one year, killed vaccine. The Commonwealth Attorney went along with this interpretation.

"According to Title 54, Chapter 19, paragraph 54-786 of the Veterinary Medicine and Surgery Practice Act of June 29, 1958 a person may practice Veterinary Medicine upon his own animals or those of his employer.

"However, under Section 54-441.1 of the Pharmacy and Drug Act the sale of rabies vaccine, except on the prescription of a practitioner lawfully practicing his profession and licensed by law to prescribe or administer biological products, is illegal.

"In view of this situation and because such a precedent would seriously hamper, if not completely invalidate, our present efforts at rabies control in Virginia, I respectfully request an official opinion from your office regarding the following questions:

"1. Does the layman have the right to practice Veterinary Medicine upon his own animals using a product obtained in violation of Section 54-441.1 of the Pharmacy and Drug Act?

"2. Has the Commonwealth Attorney placed the proper legal interpretation upon this board action in view of Section 54-441.1 of the Pharmacy and Drug Act?"

I am enclosing a copy of an opinion dated March 4, 1960, to Honorable James B. Fugate, relating to § 54-441.1, which I feel will be of interest to you.

With respect to your question (1), I am of opinion that under § 54-786 a person may practice veterinary medicine upon his own animals or those of his employer without obtaining a license from the Board of Veterinary Examiners. This section expressly exempts such person from the licensing requirements. § 54-441.1 does not provide to the contrary, but it prohibits a druggist from dispensing vaccine for the treatment or prevention of rabies to any person "except on the prescription of a practitioner, lawfully practicing his profession, and licensed by law to prescribe or administer such biological products." I do not construe this section as authorizing a druggist to sell such a drug to a person who is not a practitioner lawfully practicing his profession. If the owner or employee of an owner comes into possession of the vaccine without obtaining it on a proper prescription, there is no statutory provision preventing him from administering the vaccine under the exception contained in § 54-786.

With respect to question (2), upon examination of § 29-196 of the Code, I am constrained to express the opinion that this section does not authorize a local governing body to enact an ordinance of the nature referred to in your letter. Such an ordinance amounts, in effect, to a modification or repeal of the provisions of § 54-786. The powers of the Board in this respect would be confined to ordinances restricting the running at large of dogs, and similar matters.

You will note that in the opinion furnished Mr. Fugate I stated I was of opinion
that § 54-441.1 applies to both types of rabies vaccine—the one-year and the three-year types.

PUBLIC HEALTH—Rabies Vaccine—May be Dispensed Only Upon Prescription—May be Administered by Veterinarian or Other Licensed Physician. (258)

Drugs and Druggists—Rabies Vaccine—Dispensed Only Upon Prescription—Applicable to One- And Three-Year Types. (258)

March 4, 1960

HONORABLE JAMES B. FUGATE
Member, House of Delegates

This is in reply to your letter of March 2, 1960, which reads as follows:

"Please give me an opinion on the following:

"(1) Is it legal for a drug store to dispense rabies veterinary vaccine without a prescription from a veterinarian?

"(2) Is it necessary that a licensed veterinarian administer rabies veterinary vaccine?

"(3) There are two types of veterinary vaccine in the trade called one year vaccine and three year vaccine. Do the same regulations apply to the use of both of these vaccines?"

I call attention to § 54-441.1 of the Code, which is as follows:

"No person shall sell, give away or dispense in any manner to a consumer any biological product capable of producing a disease in an animal that may be transmissible to man or other animals, including but not limited to the following vaccines: Rabies, hepatitis or fox encephalitis, swine, erysipelas, loptospirosis, equine encephalomyelitis, anthrax, brucellosis, live hog cholera virus and ovine exthyma, except on the prescription of a practitioner, lawfully practicing his profession, and licensed by law to prescribe or administer such biological products, but nothing herein contained shall apply to vaccines used in the treatment of canine distemper."

Under this section, it is clear that a drug store is prohibited from dispensing rabies vaccine except upon a prescription. The statute does not specifically provide that such prescriptions must be written by a person licensed to practice veterinary medicine. I have discussed this question with Mr. Ralph M. Ware, Jr., Secretary of the State Board of Pharmacy, and he states that it is the custom of druggists to fill such prescriptions when issued either by a veterinary physician or a physician licensed to treat human diseases. We have also contacted one local druggist in Richmond and he confirms the statement made by Mr. Ware.

With specific reference to questions (1) and (3), I am of opinion that a prescription is required in order for a druggist to dispense rabies vaccine and such prescription may be written by either a veterinary physician or a physician licensed to treat human diseases. This would apply to the vaccine whether it is designated as the one or three year type.

With respect to question (2), I do not know of any statute prohibiting any licensed physician from administering the vaccine. I am informed by Mr. Ware that the profession has not construed the statutes so as to forbid a physician licensed to treat human diseases from administering rabies vaccine.
HONORABLE R. D. COLEMAN
Commonwealth's Attorney for Scott County

March 24, 1960

This will acknowledge your letter of March 19, 1960, which reads as follows:

"On March 1, 1960, the board of supervisors of Scott County, asked my opinion as to whether a drugstore could sell or dispense killed rabies vaccine under the provisions of Section 54-444.1 of the Code of Virginia, without a prescription of a practitioner.

"I advised the board of supervisors that since the statute specifically states 'any biological product capable of producing a disease in an animal that may be transmissible to man or other animals,' that in my opinion the killed rabies vaccine could be sold by a druggist without a prescription of a practitioner, inasmuch as the killed rabies vaccine was not capable of producing a disease in an animal that could be transmissible to man or other animals.

"There still seems to be some controversy about the matter and I would therefore thank you to give me your opinion on the following question:

"Can a druggist sell or dispense the killed type rabies vaccine under the provision of Section 54-444.1 of the Code of Virginia, without a prescription of a practitioner?"

Under the provisions of § 54-441.1 of the Code, which I quoted in full in my opinion of March 4, 1960, to Honorable J. B. Fugate, a copy of which opinion you have received from this office, it seems that the answer to your question as stated in paragraph four of your letter must be answered in the negative. A close examination of the section in question leaves no doubt that the General Assembly intended to prevent the sale or dispensing of "any biological product capable of producing a disease in an animal that may be transmissible to man or other animals" regardless of whether or not the specific vaccines mentioned in the section are actually capable of producing a disease such as stated therein.

The statute in question expressly includes vaccine for the prevention of rabies as one of the vaccines that may not be dispensed by a druggist except on the prescription of a practitioner lawfully practicing his profession and licensed by law to prescribe or administer such a vaccine. It is our understanding from competent authorities that there is on the market a killed-type rabies vaccine which is not capable of producing a disease in an animal that may be transmissible to man or other animals. However, as we have pointed out, the statute is plain and unambiguous in our opinion and definitely prohibits the sale of vaccines for the prevention of rabies and it does not make any distinction between the types of vaccine.

It is our understanding from the best advice we can obtain from the State Department of Health and from the State Board of Pharmacy that several of the vaccines mentioned specifically in this Code section are not deemed to be capable of producing a disease in an animal that may be transmissible to man or other animals. Nevertheless, such vaccines may not be sold except upon prescription, even though they do not come within the prohibited class as stated in the first part of this section.
PUBLIC OFFICERS—Boards of Supervisors—Residence of Member. (52)

August 12, 1959

HONORABLE E. L. BILLUPS
Secretary, Electoral Board of Mathews County

This is in reply to your letter of August 11, 1959, which reads as follows:

"I am again asking for a ruling from you, I sincerely appreciate information given me not long ago.
"We have in this county a man who is a candidate for the office of supervisor.
"This man is the principal of a public school in Warwick, but has a home in Mathews.
"Could this man lawfully hold the office sought for if he were elected?"

The fact that the man in question teaches school in the city of Newport News, or that portion of the city which was formerly Warwick, would not, in my opinion, prevent him from holding the office of member of the Board of Supervisors in Mathews County. The prohibitions contained in Sections 15-504 and 22-213 of the Code would not be applicable in such a case.

PUBLIC OFFICERS—Cities and Towns—Members of Council May Not Sell Insurance to City Council. (349)

May 12, 1960

HONORABLE ALFRED H. GRIFFITH
Commonwealth's Attorney
Buena Vista, Virginia

This is in reply to your letter of May 11, which reads as follows:

"A candidate for the coming election to City Council has requested that I write you for an opinion in regard to Section 15-508.
"Since he is in the real estate and insurance business and carries insurance for the City on the public school and other buildings, he would like to know if this section would prohibit him from doing this class of business if elected."

In my opinion, Section 15-508 of the Code prohibits a member of the city council from being interested, either directly or indirectly, in any contracts providing insurance coverage on the public school buildings or other buildings owned by the city. You are referred to the second paragraph of Section 15-508, which reads as follows:

"No officer of a city or town, who alone or with others is charged with the duty of auditing, settling or providing, by levy or otherwise, for the payment of claims against such city or town, shall, by contract, directly or indirectly, become the owner of or interested in any claim against such city or town. Every such contract or subcontract shall be void, and if any such claim be paid, the amount paid, with interest, may be recovered back by the city or town, within two years after payment, by action or motion in the circuit or corporation court having jurisdiction over such city or town."
This question was considered by the Honorable Abram P. Staples during his term of office as attorney general. I am enclosing copy of his opinion dated March 18, 1939, and reported in Report of the Attorney General for 1938-39, at page 209.

While the opinion rendered by Mr. Staples pertained to a member of a town council, nevertheless, it is equally applicable to a member of a city council, as the provisions just quoted from Section 15-508 apply to any officer of a city or town.

PUBLIC OFFICERS—Compatibility—Board of Supervisors and Planning Commission—Whether Citizen Member May Serve After Election to Board.

(236)

February 9, 1960

MRS. DOROTHY S. McDIARMID
Member, House of Delegates

This is in response to your letter of January 18, 1960, inquiring as to the validity of an appointment to the Planning Commission by the Board of Supervisors on January 6, 1960, pursuant to the provisions of Section 15-916, Code of Virginia, and other statutes as may be applicable under the following circumstances:

"The present Fairfax County Board of Supervisors stood for election in November 1959, qualified and took office for a term beginning January 1, 1960.

"On January 6, 1960 at a regularly scheduled meeting of the Fairfax County Board of Supervisors the Board voted 6-1 to 'continue' in office on the Planning Commission a Board member who had previously been appointed as the Board representative on the Planning Commission in the early part of 1957 with the appointment retroactive to January 1, 1956.

"On that date, namely January 6, 1960, there was a new member on the Board of Supervisors who had been elected to the Board in November 1959, and likewise took the oath of office on December 23, 1959 and commenced such duties on January 1, 1960.

"This new Board member had previously been appointed as a citizen member of the Planning Commission by the former County Board of Supervisors on July 6, 1958 to serve a four year term, and on January 6, 1960 had neither resigned his position on the Planning Commission or otherwise been removed, and has since stated his desire to retain his position on the Planning Commission."

Section 15-916 provides in part as follows:

"The board of supervisors of any county may create and appoint a county planning commission for the county. The commission shall consist of not less than five nor more than fifteen persons, one of whom may be the county manager, county executive, county engineer or county director of public works, when such officers are provided for as parts of the county administration, and one of whom may be a member of the board of supervisors. All members of the county planning
commission, other than as provided above, shall be appointed by the county board of supervisors for terms of four years. The county board of supervisors may prescribe for the original appointees terms of office of various lengths, so that not more than one-third of the subsequent appointments, other than to fill vacancies, may be made during any calendar year. The board may provide for the payment of expenses and a reasonable compensation for members of the commission who are not county employees.

"Exception for one member of the board of supervisors, the appointive members shall not be elective public county officers nor assistants to elective public county officers, though any of the appointive members may be a member of another planning commission."

Section 15-486 provides in part as follows:

"No person holding the office of county treasurer, sheriff, attorney for the Commonwealth, county clerk, commissioner of the revenue, superintendent of the poor, county surveyor, or supervisor shall hold any other office, elective or appointive, at the same time, . . ."

"If any person shall be elected or appointed to two or more offices except as herein provided, his qualification in one of them shall be a bar to his right to qualify in any of the offices enumerated, . . ."

Section 15-916 of the Code, to which you refer, authorizes the board of supervisors to create a planning commission for the county and the board may designate one of its members as a member of such planning commission. This authority for one member of the board to simultaneously hold membership on a planning commission constitutes an exception to the prohibitions contained in Section 15-486 of the Code. Under the established rules of statutory construction, this exception must be strictly construed. Applying this rule, no member of the board of supervisors may serve on the planning commission established under Section 15-916, except by appointment in such capacity by the board. The board member, who had served a previous term on the planning commission by appointment of the board, and whose term expired on December 31, 1959, was appointed by the board on January 6, 1960, to serve on the planning commission for an additional term. In this instance the statutory procedure outlined in Section 15-916 was followed. Therefore, I am of opinion that the appointment so made is valid.

While you did not specifically present the question, I am of further opinion that the board member who was elected to the board during the time he was serving as a member of the planning commission as a citizen member, as distinguished from the board member of such planning commission, ceased to be a member of the planning commission at the time he qualified for the office of member of the board of supervisors.

While, at first glance, it might be felt that a citizen member of the planning commission who, while serving a term as such, would continue to serve in that capacity after being elected a member of a board of supervisors, it is conceivable that there would be a time when two or more citizen members of a planning commission would be elected to membership on a board of supervisors. Obviously, in such an event, they could not all continue as members of the planning commission and the board, because this would create a situation where there would be more than one board member on the planning commission, which is prohibited by Section 15-916. Since it is quite obvious that the General Assembly never intended to authorize more than one board member representative on a planning commission at one time, we must construe the statute in such a way that its clear intent will be accomplished.
PUBLIC OFFICERS—Compatibility—Deputy Treasurer of County May Not Serve as Mayor of Town. (40)

HONORABLE J. P. ELKINS
Treasurer of Wise County

This is in reply to your letter of July 30, 1959, which reads as follows:

"I would like to have your opinion on a matter concerning my office. Mr. J. P. Roberson who is now serving as deputy treasurer, having been recommended by me and appointed by the court, has been elected Mayor of the Town of Pound. He will take office as mayor on September 1st.

"I would like to know if he would be eligible to hold an appointive office and elective office too. An early answer would be greatly appreciated."

Section 15-486 of the Code of Virginia provides that no person holding the office of county treasurer, sheriff and other offices, shall hold any other office, elective or appointive, at the same time, subject to certain exceptions therein set forth. Exception No. 5, you will note in this Code section, makes an exception to the effect that a deputy sheriff of a county may hold the office of town sergeant of any town within such county. No mention is made in this Code section with respect to deputy treasurers or other deputies of the specified officers.

This office has taken the position that this exception for deputy sheriffs would indicate that the Legislature construed the prohibiting clause as embracing the deputies of the officers named. It was felt by this office that this action of the Legislature was probably prompted by what the Supreme Court of Virginia said in the case of Credit Company v. Commonwealth, 155 Va. 1033 (at page 1044), which indicated that the Court felt that the policy of the law was not only to prohibit the regular county officers named in this Code section from holding other offices, but also to prohibit their deputies from doing so.

Section 15-485 of the Code provides for the appointment of deputy treasurers and prescribes their duties and states that before any such deputy shall enter upon the duties of "his office", he shall take the oath provided for county officers.

While the matter is not free from doubt, this office has heretofore taken the position that the prohibitions of Section 15-486 of the Code apply to the deputies of the officers mentioned therein unless such deputies are specifically excepted.

PUBLIC OFFICERS—Compatibility—Member of Town Council. (132)

HONORABLE EARL C. BOYER
Mayor, Town of Fries

This is in reply to your letter of October 16, 1959, which reads as follows:

"In the October 16 issue of the Roanoke Times there was an article giving your ruling on certain issues.

"I am interested in the ruling that 'no member of a town or city council is permitted to hold any other office filled by the council through appointment or election.' I am assuming from this that a member of a town council would not be eligible to serve as Water Superintendent or Building Inspector."
REPORT OF THE ATTORNEY GENERAL

I am enclosing a copy of the opinion to which you refer. This opinion relates to officers only, and there is some doubt as to whether persons holding the positions you mention would be classified as officers of the town. If they are officers, the opinion applies.

Section 15-508 of the Code would prevent a member of the town council from holding either of the positions in question if any compensation is paid for such services. This Code section may be found in the Acts of Assembly of 1958, Chapter 99 or in the 1958 supplement of Volume 3 of the Code of 1950.

PUBLIC OFFICERS—Compatibility—Police Sergeant May Not be Justice of Peace. (393)

June 20, 1960

Mr. Frank E. Swain
Justice of the Peace of Pulaski County

This will acknowledge your letter of June 15. The Attorney General's office is permitted to render official opinions to justices of the peace and other officials of this State; however, this office has no authority to render an official opinion unless the question dealt with is directly related to the discharge of the duties of the official requesting the same, except to members of the General Assembly and the Governor. See Section 2-86 of the Code.

Since the first question presented in your letter does not relate to your official duties, I regret that I cannot give you any advice with respect to that question.

Your other questions are as follows:

"Can a Police officer who holds the rank of Sergeant and is outside on active patrol duty and is hired by a municipality and acts as an executive officer for a police Dept. serve as an Issuing Justice as well as hold the rank of Sergeant? Can he serve as a Justice of The Peace under the same rule?"

In my opinion the answer to both of these questions must be in the negative. Section 15-486 of the Code prohibits any person from holding two or more offices at the same time unless the office comes within one of the exceptions set forth therein.

The offices referred to in your letter do not come within the exceptions.

PUBLIC OFFICERS—Compatibility—State Employee May Serve as Member of City Council. (364)

May 26, 1960

Honorable J. J. Jewett
Member, House of Delegates

This is in reply to your letter of May 25, in which you present the following questions:

"1. Whether or not an employee of the State of Virginia, otherwise eligible in all respects, may seek election to the Council of the City of Colonial Heights.

"2. Whether or not the answer to the above question would be dif-
ferent if such State employee was employed in the Governor’s office—Division of Personnel.

“3. Whether or not if such State employee was elected to the office of councilman of said City and should thereafter qualify for office as provided by law, would such person be prohibited from pursuing her employment with the State of Virginia.”

The first question is answered in the affirmative, and questions 2 and 3 are answered in the negative.

With specific reference to question 1, I am not aware of any statutory provisions which would prevent an employee of the State from seeking and qualifying for the office of councilman of a city or town.

The answers to questions 2 and 3 are based upon the lack of any statute forbidding the holding of such an office by an employee of the State.

I am advised by the Director of Personnel that the Governor has not put into effect any rule or policy prohibiting an employee of the Division of Personnel or other State agency from rendering public service as a member of a town or city council.

PUBLIC OFFICERS—Compatibility—Town Mayor Cannot Serve as Town Treasurer or Clerk. (122)

HONORABLE A. ERWIN HACKLEY
Commonwealth’s Attorney for Page County

October 13, 1959

This is in reply to your letter of October 10, 1959, which reads as follows:

“I have been requested on behalf of the Town of Stanley, in Page County, Virginia, to obtain a ruling from you as to whether or not the mayor or any other member of the town council could also act in an official capacity as Treasurer and/or Clerk of the town. It appears to me that you have recently made a ruling in this connection.”

I do not have access to the charter of the town of Stanley and, therefore, I am unable to determine from that document whether there are any provisions contained therein which might vary from the provisions of general law.

Section 15-393 of the Code, which is contained in Article 1 of Chapter 13 of Title 15 of the Code, relating to the government of cities and towns, reads as follows:

“No member of any council shall be eligible, during his tenure of office as such member, or for one year thereafter, to any office to be filled by the council, by election or by appointment.”

In the absence of any charter provisions to the contrary, it would appear from this Code section that no member of the council of the town could be elected as treasurer or clerk of the town. The mayor of a town is the presiding officer of the council and as such would likewise be prohibited from holding any other town office under this section. Certainly the office of mayor would be incompatible with that of treasurer or clerk of the town.
REPORT OF THE ATTORNEY GENERAL

PUBLIC OFFICERS—Compatibility of Offices—A.B.C. Board Employee May Serve as Member of County Electoral Board. (268)

March 17, 1960

HONORABLE LEVIN NOCK DAVIS
Secretary, State Board of Elections

This is in reply to your letter of March 14, 1960, to which you attach a letter from the Chairman of the Electoral Board of Greensville County, in which he requests advice as to whether or not an employee of the Virginia A.B.C. Board in a local store is prohibited from serving as a member of the electoral board of the county in which he resides.

Section 31 of the Constitution provides as follows:

"* * * No person, nor the deputy of any person, holding any office or post of profit or emolument, under the United States government, or who is in the employment of such government, or holding any elective office of profit or trust in the State, or in any county, city, or town thereof, shall be appointed a member of the electoral board, or registrar or judge of election."

The position held by this person does not in my opinion come within the prohibitions of this constitutional provision. There is no statute which would preclude such person from accepting the office in question.

PUBLIC OFFICERS—Compatibility of Offices—Deputy Commissioner of Revenue Cannot be Member of School Board. (200)

January 4, 1960

HONORABLE J. W. WHEELER
Judge of County Court of Nelson County

This is in reply to your letter of December 31, 1959, which reads as follows:

"I am asking your opinion on the following question and I will appreciate your reply as soon as possible.

I understand that no County Officer, in this case, a Deputy Commissioner of the Revenue, can be appointed to the County School Board.

This appointment has already been made and what I wish your opinion on is whether this man can now resign as Deputy Commissioner of the Revenue and his appointment be valid or whether it will be necessary for him to resign as Deputy Commissioner and then be re-appointed in the usual manner."

On December 29th we stated in a letter to Mr. F. E. Wheeler that Section 22-69 of the Code of Virginia is applicable in such cases. We were unable, for the reasons stated therein, to express an opinion with respect to the question you have presented.

You will observe that the Code section under consideration provides that no county officer, or any deputy of such officer, shall be chosen or allowed to act as a member of the county school board, subject to certain exceptions which are not material. The election of this officer to the school board was, in my opinion, a nullity, since the statute expressly prohibits such officer from being elected to or acting as a member of the school board. I do not feel that his resignation from his position as deputy commissioner of the revenue would have the effect of
ratifying the action taken by the School Trustee Electoral Board. Under such circumstances, his status as a school board member would certainly be in doubt. In my opinion, in order for this person's membership on the school board to be free from doubt, it will be necessary for him to resign as deputy commissioner of the revenue and then be elected as a member of the school board.

PUBLIC OFFICERS—Compatibility of Offices—Employee of U. S. Department of Agriculture May Not Serve on County School Board. (272)

March 21, 1960

HONORABLE Q. D. GASQUE
Division Superintendent of Schools, Warren County

This is in reply to your letter of March 17, 1960, in which you request my advice as to the eligibility of an employee of the United States Department of Agriculture to serve upon the school board of your county.

I assume the compensation of this person is paid by the United States government. If this is true, he would be disqualified under the provisions of §§ 2-26 and 2-27 of the Code of Virginia. There are several exceptions in § 2-29 of the Code to the disqualifications mentioned in the above sections. However, it does not appear that an employee of the United States government, in the capacity indicated, comes within the exceptions.

PUBLIC OFFICERS—Compatibility of Offices—Member of General Assembly May Serve on Local Board of Public Welfare (273)

March 16, 1960

HONORABLE VIRGIL H. GOODE
Commonwealth's Attorney for Franklin County

I am in receipt of your letter of March 10, 1960, in which you present certain questions which have been quoted in the following paragraph. These questions will be considered and answered seriatim.

"(1) Am I correct that Section 22-69 prohibits a person who is a member of the General Assembly from serving as a member of the local Board of Public Welfare?"

(A) I do not believe that Section 22-69 of the Virginia Code prohibits a member of the General Assembly from serving as a member of a local board of public welfare; however, this office has previously ruled that the statute in question does prohibit a member of the General Assembly from serving as a member of a county school board. See, Report of the Attorney General (1937-1938) p. 104; Report of the Attorney General (1933-1934) p. 83."
“(2) Would it be a violation of a statute to appoint as Trustee a nephew to one of the members of School Electoral Board. If not prohibited by law, wouldn’t it be against public policy?”

(A) I am unaware of any provision of Virginia law which would prohibit the appointment in question. It would thus appear that such appointment would not be contrary to public policy as reflected by statute.

“(3) Is it a violation of any statute law for a person to be a member of the Board of Supervisors of this County and vote to appropriate money for the support of a charitable hospital in said County, in which the Supervisor is a member of the Board of Directors of said Hospital, that approved the spending of the money by said hospital?”

(A) I have been unable to discover any provision of Virginia law which would prohibit a member of the board of supervisors of a county from voting in the circumstances you describe.

PUBLIC OFFICERS—Compensation—How Fixed—Employees of Departments of Welfare and Health—Constitutional Officers. (281)

March 23, 1960

HONORABLE BERTRAM F. DODSON, Member
Campbell County Board of Supervisors

This is in reply to your letter of March 16, 1960, in which you ask several questions relating to the procedure involved in establishing annual salaries for certain county officers. You are particularly interested in those officers whose salaries are fixed by the State Compensation Board and employees of the Departments of Welfare and Health.

The salaries of the employees of the Welfare and Health Departments, except in limited localities not here material, are fixed according to the Merit System Plan as provided by statute. Hence, very little discretion remains to be exercised in fixing the salaries of such employees beyond establishing the maximum and minimum salary scale.

The salaries of the constitutional officers mentioned in your letter are fixed in the following manner. Section 14-62 of the Code of Virginia provides for attorneys for the Commonwealth, city and county treasurers, commissioners of revenue, certain sheriffs and certain city sergeants to file an annual request with the Compensation Board for allowance of salary and expenses in their respective offices. A copy of such request is to be concurrently filed with the governing body of the affected county or city.

Section 14-63 of the Code of Virginia provides that the Compensation Board shall thereafter tentatively fix the salaries and expenses of the affected officers, and notify the governing body of each county and city of the amounts so fixed.

In the event the governing body has objection to the amounts fixed by the Compensation Board, it may, within 30 days of such notice, file its objection with the Board. A procedure is provided for a hearing before the Board in order to determine the merits of such protest.

Within 45 days from the date of the final decision of the Board, any officer, county or city affected thereby, or the Attorney General as representative of the Commonwealth, may appeal from such decision to a court of competent jurisdiction, pursuant to the procedure provided in Section 14-65 of the Code.
PUBLIC OFFICERS—Housing Authorities—May Contract With Firm in Which Chairman of Authority is Employed. (352) May 18, 1960

Mr. E. C. Jones
Executive Director
South Norfolk Redevelopment & Housing Authority

This is in reply to your letter of May 17, which reads as follows:

“As Executive Director of the South Norfolk Redevelopment and Housing Authority I request an opinion from you as to whether or not it would be legally permissible for the Housing Authority to sign a contract for architectural services with a firm which employs as a draftsman the Chairman of this Housing Authority.

“My request is based on Section 36-16 of the Code of Virginia which provides that no commissioner, officer, agent or employee of an Authority shall have any interest, direct or indirect, in any Housing Project or any property to be included in any Project, nor in any contract or proposed contract for materials or services to be furnished.”

Section 36-16 of the Code reads as follows:

“No commissioner, officer, agent or employee of an authority shall acquire any interest direct or indirect in any housing project or in any property included or planned to be included in any project, nor shall he have any interest direct or indirect in any contract or proposed contract for materials or services to be furnished or used in connection with any housing project.”

This section of the Code is similar to other sections of the Code relating to county and city officials, such as Sections 15-504 and 15-508. Generally, this office has ruled that the prohibitions contained in these sections do not apply to an officer (in this case a housing commissioner) who is an employee of a firm furnishing supplies or services, unless the employee receives a pecuniary advantage out of the transaction, such as a commission on the sale. For your information, I enclose copy of an opinion by former Attorney General Staples (Report of Attorney General for 1938-39, at p. 210).

In the case presented by you, if the Chairman of the Housing Authority does not receive any additional salary from his employer as a result of the contract made with the architectural firm, and further if he abstains from acting on behalf of the Housing Authority in negotiating the contract for the architectural services, I am of opinion there will be no violation of Section 36-16 of the Code.

PUBLIC OFFICERS—Justice of Peace is State Officer Under §15-504. (47)

August 6, 1959

Honorable Bernard Mahon
Commonwealth’s Attorney for Caroline County

This is in reply to your letter of August 5, 1959, which reads as follows:

“Please advise whether a Justice of the Peace in Caroline County, who is an agent for a mutual insurance company can sell public liability and property damage insurance to the County School Board of Caroline County, Virginia on a competitive bid basis.”

Section 15-504 of the Code provides, in part, as follows:
"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, judge of the county court, sheriff or any paid officer, of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county."

It will be noted that this statute prohibits certain designated officers or any paid officer of the county from being interested in any manner in contracts with the county or any fees, commissions or premiums or profits therefrom. In consideration of the question, it is necessary to determine whether or not a justice of the peace is an officer of the county.

The late Honorable John R. Saunders, during his service as Attorney General, issued an opinion holding that a justice of the peace is a State officer. This opinion is dated April 26, 1932 and is published in the Report of the Attorney General for the year 1931-32, at page 141. Attorney General Saunders based his opinion upon the case of Burch v. Hardwicke, 30 Gratt. page 24 (71 Va., p. 22), in which the court said that a justice of the peace is a State officer. Since that decision was handed down, Section 108 of the Constitution has been adopted and placed in Article VI of the Constitution which establishes the judiciary department of the State, rather than in Article VII relating to county officers.

This office, under date of November 25, 1952, in an opinion published in Attorney General Report for 1952-53, at page 222, in considering whether or not a justice of the peace was a local officer or a State officer for the purpose of social security coverage under Title 51 of the Code, held that a justice of the peace is a State officer, which opinion has been adhered to in subsequent opinions.

I am of the opinion, therefore, that Section 15-504 does not prohibit a justice of the peace from selling insurance to the county school board on a competitive bid basis.

PUBLIC OFFICERS—Oath of Office—County Planning Commission Members Must Take. (242) February 16, 1960

HONORABLE B. B. ROANE
Clerk of Circuit Court of Gloucester County

This is in reply to your letter of February 12, 1960, which reads as follows:

"Your opinion will be appreciated as to whether or not members of the County Planning Commission appointed by the Board of Supervisors, pursuant to Section 15-916 of the Code of Virginia and amendments thereto, are required to take the oath of office prescribed in Section 49-1 of the said Code."

The members of a county planning commission appointed under Section 15-916 are public officers. In my opinion, unless there is some specific statutory provision
to the contrary, in order to qualify for such office all officers must take the oath prescribed in Title 49 of the Code. Where the statute creating the office does not specifically prescribe where the qualification under oath shall be taken, it would appear that this should be done in the court of the county or the corporation in which the duties are to be discharged.

In this connection you are referred to Section 49-8 of the Code.

PUBLIC OFFICERS—Substitute County Judge May Not Sell Insurance to Board of Supervisors. (341)

HONORABLE C. A. HOLLOWAY
Chairman, Board of Supervisors Caroline County

This is in reply to your letter of May 7, which reads as follows:

"Since Bernard Mahon, Commonwealth Attorney of Caroline County, is ill, and we have been some six months without a Commonwealth Attorney to advise us, as Chairman of the Caroline Board of Supervisors, I wish to ask your opinion on a question which confronts the Board.

"The insurance on the Court House and other county-owned buildings has been divided between two insurance agencies; DeJarnette and Beale and Julien J. Mason. These policies are up for renewal for a five-year period at this time. Since the policies were last issued, Mr. Mason has become Assistant County Judge of Caroline County. The question I wish answered is Can the Board legally renew the policy with Mr. Mason?"

In my opinion any contract for the sale of insurance by the Substitute County Judge to the county would be in violation of Section 15-504 of the Code, which provides as follows:

"No supervisor, superintendent of the poor, special policeman, commissioner of the revenue, treasurer, attorney for the Commonwealth, clerk of the court, judge of the county court, sheriff or any paid officer of the county shall become interested, directly or indirectly, in any contract, or in the profits of any contracts, made by or with any officer, agent, commissioner, or person acting on behalf of the supervisors, the county school board, or superintendent of the poor of the county, or in any contract, fee, commission, premium or profit therefrom, paid, in whole or in part, by the county or any board, commission or agency thereof, or in the sale or furnishing of supplies or materials to such county, and shall not become interested, directly or indirectly, in any contract, or in the profits of any contract, made by or with any officer, agent, commissioner, trustee or overseer for working and keeping in repair the public roads in the county."

The prohibitions of this section, you will observe, apply to a "judge of the county court" or "any paid officer of the county."

I feel that the Act applies to a substitute judge of a county to the same extent as the regular county judge. Furthermore, a substitute county judge is a paid officer of the county.
REPORT OF THE ATTORNEY GENERAL

PUBLIC OFFICES—Compatibility—County School Board—Rural U. S. Mail Carrier—Not Disqualified From Serving as Member. (17)

July 13, 1959

HONORABLE J. THOMAS WALKER
Superintendent, Spotsylvania County Schools

This is in reply to your letter of July 10, 1959, which reads as follows:

"The School Trustee Electoral Board of Spotsylvania County has recently elected to the County School Board of Spotsylvania a member representing Berkeley District who is a substitute rural mail carrier. The question is, can he continue in both positions?"

Under the provisions of Section 2-29(5) of the Code, a rural mail carrier is not disqualified from being appointed and holding any county or district office. In my opinion this statute would be applicable to a substitute rural mail carrier.

It is my opinion, therefore, that the person in question may be appointed and serve on the county school board.

PUBLIC OFFICES—Effect of Redistricting of Magisterial Districts—Justices of Peace. (232)

February 10, 1960

HONORABLE L. H. SHRADER
Judge, Amherst County Court

This is in reply to your letter of February 6, 1960, in which you state that a new magisterial district, designated as Madison District, has recently been formed in your county from Elon Magisterial District. As a result, the residence of a person who was elected justice of the peace for Elon District and who, I assume, took office on January 1, 1960, is now residing in Madison District. You request my opinion as to whether such person may continue to hold the office to which he was elected as a justice of the peace for Madison District.

Section 24-157 of the Code provides as follows:

"In each magisterial district there shall be chosen by the qualified voters thereof at the general election to be held on the Tuesday after the first Monday in November, in the year nineteen hundred and fifty-one, and every four years thereafter, one supervisor and three justices of the peace, who shall hold their offices for the term of four years."

Section 112 of the Constitution provides that:

"Regular elections for county and district officers shall be held on Tuesday after the first Monday in November, and such officers shall enter upon the duties of their offices on the first day of January next succeeding their election, and shall hold their respective offices for the term of four years, except that the county clerks shall hold office for eight years."

Section 108 of the Constitution provides:

"The General Assembly may provide for the appointment or election of justices of the peace and prescribe their jurisdiction."
Pursuant to this latter section, the General Assembly has provided in Section 24-157 of the Code, cited above, for the manner of election of a justice of the peace and, in accordance with the mandate of Section 112 of the Constitution, has provided that their term of office shall be four years.

Furthermore, under Section 39-4 of the Code, a justice of the peace of a magisterial district has jurisdiction throughout the county in which his district is located.

In view of these statutory and constitutional provisions, I am of opinion that the person in question did not lose his office on account of the re-districting subsequently had. Section 15-488 of the Code would not be applicable, since this person has not in fact moved his residence.

With respect to the other question regarding a person who ran for supervisor in the special election and was defeated for that office, but received, I assume, sufficient votes to be elected to the office of justice of the peace by the write-in method, I am of opinion he is not disqualified from qualifying for that office on account of having run for supervisor. Had he been elected to both offices he could have elected to qualify for either of said offices. The statute does not expressly make provision for such a situation, but it would seem that the justice of the peace who was elected for Elon District, but now lives in Madison District, would continue to hold the office of justice of the peace, provided he qualified for same within the time prescribed by Section 15-475 of the Code, for Elon District during the remainder of his term, and thus Madison District would be entitled to the three justices who were elected at the special election.

I enclose a copy of an opinion issued by this office on January 16, 1952, to Honorable Edwin Lynch (Attorney General Report of 1951-'52, at page 24), which discusses the effect of re-districting on the office of supervisor.

PUBLIC WELFARE—Local Board—When Board May Consist of Four Members. (354)

HONORABLE RICHARD W. COPELAND, Director
Department of Welfare and Institutions

May 18, 1960

I am in receipt of your letter of May 13, 1960, in which you call my attention to House Bill No. 455, which was passed by the General Assembly of Virginia at its recent session and appears as Chapter 513 of the Acts of Assembly of 1960. The legislation in question, effective June 27, 1960, amends Section 15-290 of the Virginia Code relating to departments of public welfare in certain counties. You inquire whether Albemarle County, which has adopted the county executive form of government established by Title 15, Chapter 11, Article 2, of the Virginia Code, "will hereafter have a board of welfare in compliance with Section 15-290 of the Code rather than having a board as presently appointed under the provisions of Sections 63-52 and 63-60 of the Code."

Section 15-290 of the Virginia Code initially appeared as a portion of Chapter 368 of the Acts of Assembly of 1932, Acts of Assembly (1932) p. 735. In pertinent part, this statute in its original form provided:

"The superintendent of public welfare, who shall be head of the department of public welfare, shall be chosen from a list of eligibles furnished by the State commissioner of public welfare. * * *

"The board of county supervisors may select two qualified citizens of the county, who shall serve without pay, and who, together with the head of the department, shall constitute the county board of public welfare. * * *"
Thereafter, the General Assembly enacted what is popularly known as the Public Assistance Act of 1938. Acts of Assembly (1938) p. 638 et seq. This legislation expressly repealed all acts and parts of acts inconsistent with its provisions and was subsequently codified as Title 63 of the Code of Virginia (1950). Although Section 63-52, as originally codified, prescribed that the local boards of public welfare in each county "shall consist of three members, residents of the county, appointed by the judge of the circuit court" of such county, Section 63-60 provided, in part:

"Notwithstanding the foregoing provisions of this article in any county which has adopted, or shall hereafter adopt, the county executive form of organization and government, . . . the local board shall, while such form of organization and government remains in effect in such county, be appointed by the governing body of such county, ** *"

Enactment of the above mentioned provisions of the Public Assistance Act of 1938 repealed Section 15-290 of the Virginia Code to the extent that the latter statute was inconsistent with those provisions subsequently codified as Sections 63-52 and 63-60 of the Virginia Code. However, as you point out, the General Assembly amended and reenacted Section 15-290 at its regular session of 1960. To the extent material here, the amended statute prescribes:

"Sec. 15-290.—The superintendent of public welfare, who shall be head of the department of public welfare, shall be chosen from a list of eligibles furnished by the State Commissioner of Public Welfare. ** **

"The board of county supervisors may select two qualified citizens of the county, who shall serve without pay, and who, together with the head of the department shall constitute the county board of public welfare, provided that in any county having a population of not less than twenty-six thousand six hundred and not more than twenty-six thousand six hundred and eighty, the county executive thereof shall also be a member of such board. ** *"

The italicized language of the above quoted statute constitutes the 1960 amendment. In accordance with the terms of the amended statute, the local board of public welfare—in any county which has adopted the county executive form of government and has the specified population—will consist of four members: the superintendent of public welfare, two qualified citizens of such county appointed by the board of supervisors and the county executive. To the extent that Sections 63-52 and 63-60 are inconsistent with the provisions of the recently amended statute, the latter enactment prevails as the latest expression of the General Assembly upon the subject in question. 17 M. J. 311: Statutes, Section 53; 2 Sutherland on Statutory Construction 532, 539: Sections 5201, 5202. I am, therefore, of the opinion that the local board of public welfare of Albemarle County—if such county has the prescribed population—should be constituted in compliance with the provisions of Section 15-290 of the Code of Virginia (1950) as amended, from and after the effective date of the 1960 enactment.

REAL ESTATE BROKERS—Exclusive Listing Contract Must Contain definite Termination Date—Contract Construed. (353)

Honorable Turner N. Burton
Director, Department of Professional and Occupational Registration

This is in reply to your letter of May 9, which reads as follows:
“It is requested that you advise if the attached Standard Lease Form of James M. Marshall, of Charlottesville, Virginia, in your opinion, constitutes an exclusive listing and if so, would such an agreement be in violation of Subsection (12) of Section 54-762, Code of Virginia, 1950? That part of the agreement which appears to the Virginia Real Estate Commission to be in conflict with the above section of the Code, is underlined in red for ready reference. It would be appreciated if you will return the enclosed agreement with your opinion.”

Section 54-762 of the Code provides as follows:

“The Commission may upon its own motion and shall upon the verified complaint in writing of any person, provided such complaint, or such complaint together with evidence, documentary or otherwise, presented in connection therewith, makes out a prima facie case, investigate the actions of any real estate broker or real estate salesman, or any person who assumes to act in either capacity within this State, and shall have the power to suspend or to revoke any license issued under the provisions of this chapter, at any time when the licensee has by false or fraudulent representation obtained a license, or when the licensee in performing or attempting to perform any of the acts mentioned herein, is deemed to be guilty of:

* * * * *

“(12) Making an exclusive listing contract which does not have a definite termination date;”

The Standard Lease Form under consideration provides that the duration of the lease is from one date to a subsequent date, and contains the following renewal paragraph:

“Either party hereto may terminate this lease at the end of said term, by giving the other written notice at least three months prior thereto; but in default of such notice this lease shall continue, upon the same terms and conditions as are herein contained, for a further period of one year and so on from year to year until terminated by either party hereto giving the other written notice at least three months prior to the expiration of the current term.”

The duration of a lease under the Standard Lease Form is clearly stated. The lease runs for a definite term, commencing at noon on one date and ending at noon on a later date. The contract contains a provision generally found in leases, extending the lease for definite periods, unless one of the parties gives a timely notice that no extension of the lease is desired. Therefore, at all times the termination date may be definitely determined.

The Standard Lease Form contains this provision:

“The Lessor agrees that no real estate agent, broker, or salesman, shall show the property for sale or lease to any prospective purchaser as long as the present Lessee occupies the premises, unless the appointment is made through James M. Marshall, Agent.”

The question is whether or not this exclusive listing provision is in violation of § 54-762 (12) of the Code.

In the lease under consideration the property owner, in the event he should decide to sell or lease to another person the property covered by the lease, has agreed that the right to sell or lease the property shall be in his rental agent exclusively. This exclusive listing is limited to the duration of the lease. Since
the lease contains a definite termination date, which is the end of the initial term or the end of any subsequent term, in my opinion there is no violation of paragraph (12) of § 54-762 of the Code.

A similar situation was considered by this office on January 2, 1957, in connection with a contract for the sale of real estate, in which this provision appeared:

"* * * the undersigned hereby authorize and give you, the above named Real Estate Broker, the exclusive rights, privilege, and agency for a period of 60 days from this date, and thereafter until written notice of termination of this agreement is given * * * ."

On July 23, 1957 another agreement of similar nature was presented to this office in connection with Goodman-Segar-Hogan Residential Sales Corporation, in which the exclusive listing provision was as follows:

"2. Owner appoints Agent as exclusive agent for said property for a period of ................. days from the date hereof and thereafter for consecutive periods of thirty (30) days each, unless and until terminated by Owner by at least ten (10) days' written notice to Agent, provided, however, that the term of this agency shall in no event continue for more than six months from the date hereof."

This office, you will recall, was of the opinion that the contract provision just quoted was not in violation of § 54-762 (12) of the Code.

The opinion expressed herein is not contrary to the conclusion reached in the two cases cited.

The statute under consideration here is penal in nature and must be construed strictly against the imposition of a penalty. In this case the termination date of the agent’s right to sell the property is definitely established to be at the end of any term during which the lease is in effect.

The lease contains an additional paragraph which reads as follows:

"The Lessor further agrees, in consideration of said Agent negotiating this lease and handling said real estate for the Lessor, in event of sale of the premises by any real estate agent, broker, or salesman, other than said Agent, that said Agent shall be entitled for his services as Lessor’s Agent to a commission of one-half (½) of the then standard real estate commission."

This paragraph does not purport to give the exclusive right to sell the property to the agent who negotiated the lease. It merely provides that, in the event of the sale of the property by another agent, the owner will pay one-half of the standard commission to the agent who negotiated the lease.

You have furnished me with a policy statement or resolution of the Virginia Real Estate Commission, which reads as follows:

"That subsection (12) of Section 54-762, Code of Virginia, 1950, makes it mandatory for every exclusive listing contract to have a definite termination date therein. 'A definite termination date' means exactly what it implies, that the date set forth in the exclusive agency contract is to be definite as to the date of termination of the provisions of the contract, and further, that the contract should end or is terminated on that specific date set forth in the contract; and also, that it is not to the best interest of the public to include in any exclusive contract a provision, or provisions, making it encumbent upon the client to terminate the contract by written notice to the agent."

To the extent that this statement is in conflict with this opinion, in my judgment, it is not enforceable.
REAL PROPERTY—Deeds of Conveyance to be Distinguished from Deeds of Correction. (375)
Taxation—Recordation—Deed from One Spouse to both to be Taxed at Full Value of Land Conveyed. (375)

HONORABLE JOHN V. FENTRESS, Clerk
Circuit Court of Princess Anne County

This letter is in answer to your letter of June 3, 1960, inquiring whether a certain deed presented for recordation in your office and containing certain recitals is to be considered a deed of correction or a deed of conveyance, and if the latter, whether the recordation tax is to be based upon the full value or one-half value of the property conveyed therein.

The deed in question recites to the effect that the wife previously purchased the real estate and gave her note secured by a deed of trust for the unpaid purchase price. The deed further recites that her husband was away in the armed forces at that time and therefore could not sign either the note or deed of trust. Consequently, the seller conveyed the property solely to the wife. The deed then goes on to recite that the husband has now paid a portion of the purchase price and has endorsed the said note, and that she, therefore, desires to convey the same real estate to her husband and herself as tenants by the entireties with right of survivorship as at common law, which she does in the deed.

A deed of correction is a deed that corrects or rectifies an error or mistake made in a previous deed by the parties thereto, and from the recitals in the above deed, I am of the opinion that it is one of conveyance rather than one of correction. This is because the seller, in the deed by which the wife initially acquired the property, intended to convey the property solely to the wife as her husband was not available at that time to execute the note and deed of trust. Thus, the deed in question is merely a subsequent conveyance by the wife to her husband and herself and not a correction of a mistake or error made by parties to a previous deed. Also, the enclosed letter written on October 21, 1952, by this office to the Honorable Littleton M. Mears, Commonwealth's Attorney for Northampton County (Opinions of the Attorney General 1952-1953, p. 241) reaches the same conclusion concerning an almost identical situation.

Moreover, I am of the opinion that the recordation tax on the deed in question should be based on the entire value rather than one-half of the value of the property conveyed. My reasons for this are set forth in the enclosed letter to Mr. C. H. Morrissett, State Tax Commissioner, dated May 24, 1960.

RELIEF ACTS—Apprehension of Felon—Damage to Property Caused by Police—May be Reimbursed by Special Act of General Assembly. (73)

HONORABLE NATHAN B. HUTCHERSON
Member, House of Delegates

This is in reply to your letter of August 19, 1959, which reads as follows:

"I am writing concerning the destruction of a barn and other damages suffered by Mr. and Mrs. Luther Smith of my County, when their grandson, without their knowledge, who was being hunted by the State Police and County Officers, hid out in their barn. During the attempt of the State Police to capture the boy (Earl Smith), Mr. and Mrs. Smith's barn was burned and they suffered a great deal of other damages."
"We have had estimates made as to the approximate cost of replacing this building and the low bid is $13,452.00. We have also had estimates made as to the general damages suffered by Mr. and Mrs. Smith, and find they amount to $2,145.00.

This barn was burned through no fault of Mr. and Mrs. Smith and the other damages incurred through no fault of theirs.

"Would you please advise me what steps it is necessary that I take for Mr. and Mrs. Smith to be reimbursed for their damages?"

There are no general statutes under which either the State or the locality may satisfy the damage in a case such as you have presented. Relief in such cases may be authorized by the General Assembly.

I find that Chapter 661, Acts of 1952, is an Act for relief in a similar instance. I suggest that you might find this Act helpful in drafting an appropriate Bill to be introduced at the next session of the General Assembly.

SANITATION AUTHORITIES—Water and Sewer Authorities Act—County May Pay Necessary Expenses in Establishment Prior to Issuance of Revenue Bonds. (176)

December 8, 1959

HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

Reference is made to my opinion of November 25, 1959, in response to your letter of November 12, 1959, relating to the authority of the Board of Supervisors to pay from the general county levy the salary of an executive secretary to the Loudoun County Sanitation Authority.

In that letter I stated that under the provisions of Chapter 22.1 of Title 15 of the Code of Virginia, the expense of current operation and maintenance of the sanitation system should be paid out of the receipts of fees and charges for the services rendered by the Authority to its customers.

You have read to me by telephone today, copy of the resolution passed by the board of supervisors of your county, which reads as follows:

"WHEREAS, by resolution duly adopted on the 1st day of June, 1959, the Board of Supervisors employed one Horace M. Hallett to act as Executive Secretary for the recently organized Loudoun County Sanitation Authority,

"AND, WHEREAS, there has been some confusion as to the category that the said Horace M. Hallett is in as result of said appointment,

"AND, WHEREAS, to clarify this it was the purpose and intent that the said Horace Hallett has been and is to be a Special Assistant to the Board of Supervisors to assist the said Loudoun County Sanitation Authority and the engineers employed thereby in the performance of their service and to be in the position of their liaison officer representing this Board in its relationship with the said engineering firm and the said Sanitation Authority,

"THEREFORE, be it resolved that the said Horace Hallett be and he is hereby designated and appointed as such Special Assistant to this Board as set forth above and his acts and the performance of his duties since taking office on the 1st day of July, 1959, are hereby validated,
ratified and approved, and he is to continue as such on the salary basis as hereinbefore established until this relationship with the Board be determined by further resolution hereon."

In addition to this resolution this office conferred by telephone with Honorable Stirling M. Harrison, Commonwealth's Attorney of the county, and with you. It is clear from my conversation with you and with Mr. Harrison and from the terms of the resolution that the service being performed at the present time by Mr. Hallett is an expense incurred, prior to the issuance of revenue bonds, for engineering studies and for estimates of costs and of revenues and for other technical and professional services deemed essential in connection with the establishment of the Authority.

It is provided in Section 15-764.2(n) that such expenses may be regarded as a part of the costs of such system, implying that such expenses may be met out of the general fund and reimbursed out of the revenues received under Section 15-764.22. This provision does not prohibit the Board of Supervisors from paying out of the general fund the initial cost in connection with the establishment of the Authority. Inasmuch as the services being rendered by Mr. Hallett are necessary expenses incurred by the Board of Supervisors in the establishment of this facility, I am of the opinion that the Board of Supervisors has authority to pay these expenses out of the general fund.

Nothing in this opinion may be construed to imply that after the Authority has been established the expenses of operation may be paid out of the general fund. Such operating expenses are payable out of the revenues realized from the project or from the proceeds of bonds issued pursuant to Section 15-764.14, et seq. of the Code.

SANITATION AUTHORITIES—Water and Sewer Authorities Act—Salary of Executive Secretary—Paid out of Fees and Charges Collected. (166)

HONORABLE GEORGE W. TITUS
Treasurer of Loudoun County

This is in reply to your letter of November 12, 1959, which reads as follows:

"This county has a sanitation authority in operation which was chartered by the State Corporation Commission on May 27, 1959. The ordinance for the Loudoun County Sanitation Authority was passed by the Board of Supervisors at the July 6, 1959, meeting and made effective July 24, 1959.

"On June 1, 1959, at a regular meeting of the Board of Supervisors an executive secretary of the newly formed Loudoun County Sanitation Authority was appointed effective July 1, 1959, at a salary of $6,500.00 per year.

"The point which I would like for you to make clear is whether or not I as the Treasurer of Loudoun County am authorized to pay the salary of this executive secretary. There is not any special levy for this purpose, as it is an expenditure of the general revenue fund. There has been some question as to the legality of paying this salary."

I presume that the Loudoun County Sanitation Authority was duly created pursuant to the provisions of Chapter 22.1 of Title 15 of the Code of Virginia [§§ 15-764.1 through 15-764.32 inclusive]. It is apparent from a study of this chap-
ter, known as the "Virginia Water and Sewer Authorities Act," that the expenses of current operation and maintenance of the sanitation system operated by the Authority are to be paid out of receipts from fees and charges for service, with the exception of the expense of the initial placing of the system in operation by the Authority (§ 15-764.2(n)) which expenses are part of the initial "cost" of such system.

Specifically, § 15-764.22 states, in part:

"Such rates, fees and charges shall be so fixed as to provide funds, with other funds available for such purposes, sufficient at all times (a) to pay the cost of maintaining, repairing and operating the system or systems on account of which such bonds are issued, including reserves for such purposes and for replacement and depreciation and necessary extensions, (b) to pay the principal of and the interest on the revenue bonds as the same shall become due and reserves therefor, and (c) to provide a margin of safety for making such payments."

Although you state that the Board of Supervisors appointed an executive secretary of the Sanitation Authority at a salary of $6,500.00 per annum, I believe § 15-764.11 controls and provides that the duly appointed members of the Authority "shall elect a secretary and a treasurer who need not be members of the authority." The members of the Authority, serving in the manner of a board of directors of a corporation, should select administrative operating personnel and fix their rate of compensation. This compensation should be paid from fees and charges collected for service furnished by the system operated by the Authority.

Although the liberal construction of the Act called for by § 15-764.32 of the Code indicates that it is within the powers of the Authority to borrow money for initial expenses, I can find no statutory authorization for the Board of Supervisors to make a loan to the Authority from the general county fund. I am of the opinion, further, that there is no authority for the Board of Supervisors to pay the current expenses of operation of the Authority, including the salary of the Executive Secretary, from the general county fund. Section 15-16.4 of the Code permits a board of supervisors to make advances from the general funds to a sanitary district to assist it in the initiation of the project for which it was created, but no similar legislation was found to be in effect with respect to Water and Sewer Authorities.

SANITARY DISTRICTS—Bonds—Proceeds of Sale May be Expended to Improve Water Distribution System Jointly with Soil Conservation District. (74)

August 26, 1959

Mr. R. A. Bowman, Clerk
Board of Supervisors of Augusta County

This is in reply to your letter of August 24, 1959, in which you state that at a special election held on September 4, 1956, the following question was submitted to the qualified voters of South River Sanitary District of Augusta County:

"Shall the Board of Supervisors of the County of Augusta issue bonds of South River Sanitary District, of Augusta County, Virginia, as enlarged, in the aggregate principal amount of $483,000.00, to raise funds
necessary to finance the enlargement, extension and improvement of the existing water distribution system in said Sanitary District, as enlarged, and the improvement of the impounding dam and spillways in Cole's Run, pursuant to the provisions of Chapter 2, Title 21, of the Code of Virginia, and Acts Amendatory thereof, such improvements and extensions constituting a specific undertaking from which said Sanitary District may derive revenue?"

You further state in your letter:

"Since the referendum was held and a favorable vote to proceed with sale of the bonds and the various things contained in the question, approximately $5,000.00 has been spent on a spillway located on the dam in Cole's Run, and since the sale of the bonds and the extension and improvement of the existing water system, the Federal Soil Conservation Commission has sought to construct a dam in another stream flowing west off the Blue Ridge Mountains and impound a considerable body of water in that stream bed, and South River Sanitary District through the Board of Supervisors of Augusta County wish to participate in the construction of the dam and impounding of the water as it will give the Sanitary District an additional needed source of water supply inasmuch as the growth of the area has been quite remarkable and there is some threat that Cole's Run water supply will be eventually inadequate to serve the area included within the Sanitary District. There is a fund of $100,000.00 remaining from the proceeds of the sale of the bonds in the hands of the County Treasurer.

"The subject on which the Board of Supervisors wishes to have you give them an opinion is whether or not the use of the $100,000 in a joint effort by the County and the Soil Conservation and Development Commission to construct the impounding dam so as to obtain the additional supply of water in the Sanitary District will in any way violate the conditions under which the bonds were sold as were outlined above.

"For your further information there is only one spillway on Cole's Run dam, and at the time that the bonds were sold, it was contemplated that an additional spillway would be built. This second spillway was a safety measure which was contemplated would take care of any devastating flooding situation in the area above Cole's Run dam. No such flooding has taken place since the construction of the dam in 1950."

This office has contacted you by telephone and you state that the Soil Conservation Commission referred to in your letter is a soil conservation district established under the provisions of Chapter 1, Title 21 of the Code, and not a federal project. It is proposed to expend the balance of the bond issue funds in cooperation with the Soil Conservation District in the building of an additional dam within the area of South River Sanitary District for the purpose of soil conservation and also as a means of providing a source of increased water supply for the water distribution system mentioned in the question submitted to the voters.

One object of the bond issue, as stated in the question submitted to the voters, was to "raise funds necessary to finance the enlargement, extension and improvement of the existing water distribution system in said Sanitary District..." In my opinion, the building of the proposed dam would be a means of accomplishing these purposes for which the bond issue was approved. The construction of a facility that will provide an increased water supply from funds authorized by the voters would, in my opinion, come within the scope of the authorization to the same extent as the laying of additional pipe lines. The fact that this is a joint undertaking with another governmental subdivision does not, in my judgment, create any valid objection to the proposed project.
REPORT OF THE ATTORNEY GENERAL

In my opinion the expenditure of the balance of the bond issue funds to construct the dam in the manner proposed would not violate the conditions under which the bonds were issued and sold.

SANITARY DISTRICTS—Short Term Financing—May Borrow and Pledge Revenues. (53)

HONORABLE WM. M. Mcclenney
Commonwealth's Attorney for Amherst County

August 12, 1959

This is in reply to your letter of August 11, 1959, which reads as follows:

"Pursuant to our telephone conversation today, I need an immediate opinion on the question hereinafter set out. My Board is pressed for time and plan to meet Thursday night and would like to have your opinion in hand, the question is as follows:

"Can a Board of Supervisors which has a Sanitary District under its control and which has an income of Seventy five Hundred Dollars per year make a loan from a private banking institution upon a pledge of only the revenue from the utility for repayment of the loan? The loan is estimated not to exceed $20,000.00 which of course could be discharged in a short period of time, in other words it would be a temporary loan."

I assume that this is a sanitary district established under the provisions of Chapter 2, Title 21 of the Code of Virginia. The powers and duties of the Board of Supervisors with respect to a sanitary district are contained in Section 22-118, and they include construction, maintenance and operation of the facilities deemed necessary within the categories therein set out. As an incident to these powers financing the projects is, of course, authorized. Article 2 of this Chapter provides a method of financing under which the obligations would be general and payment could be demanded by the bond holders out of the general revenues of the county. This method of raising capital, however, is not exclusive, as stated in my opinion to you dated July 31, 1959.

Article 3, Chapter 10, Title 15 of the Code authorizes counties to contract to borrow money on a short time basis where the debt is created in anticipation of the collection of the revenue of the county. Loans contracted under this section are subject to the limitations of Section 115(a) of the Constitution and payable out of the general revenues of the county.

As I construe your letter, the Board of Supervisors plans to contract for a loan that is not subject to the restrictions of Article 3, Chapter 10, Title 15 of the Code and Section 115(a) of the Constitution, but will be under a contract whereby the lender may collect only from the revenues of the facility or facilities being operated by the sanitary district, and that under no circumstances will the revenues of the county from any source, except from the rents and charges made and collected from the users of the facility, be available for the payment of the notes or other evidences of debt held by the lender or by any purchaser thereof.

If the loan is contracted on that basis, I am of the opinion the Board has the authority to borrow the money.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Apportionment and Allocation of Appropriations—Where no Public Schools Operated. (33)

July 28, 1959

HONORABLE DAVIS Y. PASCHALL
Superintendent of Public Instruction

I am in receipt of your inquiry as to the responsibility of the State Board of Education in making apportionment and allotment of the appropriations made in Items 138, 139 and 140 of Chapter 96 of the Acts of the General Assembly of Virginia, Special Session, 1959, this Chapter being the one dealing with the appropriation of the public revenues of the State. Specifically, you inquire if and under what circumstances any portion of the appropriations provided for in said Items can be apportioned and allotted to a locality in which public schools may not operate for the school session 1959-60.

Pursuant to the provisions of Article IX of the Constitution of Virginia, the General Assembly of Virginia established an efficient system of public free schools throughout the Commonwealth, and provided that the system be administered by a State Board of Education, a Superintendent of Public Instruction, Division Superintendents of Schools, and County and City School Boards. Laws have been enacted by many Assemblies detailing the respective duties of said Boards and individuals entrusted with the administration of the system. With the exception of the annual interest on the Literary Fund, a portion of the capitation tax, and an amount equal to the total that would be received from an annual tax on property of not less than one nor more than five mills on the dollar, often referred to as the "Constitutional appropriation," no public moneys were earmarked for the maintenance of public schools.

Section 135 of the Constitution provides that revenues from the above-mentioned three sources be applied by the General Assembly "to the schools of the primary and grammar grades for the equal benefit of all the people of the State, to be apportioned on a basis of school population; the number of children between the ages of seven and twenty years in each school district to be the basis of such apportionment." It is important to note that notwithstanding the direction of the Constitution that the General Assembly apply certain funds to the schools of the primary and grammar grades, this provision of the Constitution is not "self-executing." That is, the revenues which are collected from the three sources do not flow automatically from the State treasury to the localities. Revenues from these sources have to be applied by the General Assembly, and this requires affirmative action on the part of that body, in the form of an appropriation, before the money can be either apportioned or disbursed to any locality.

The "Public free school system" envisioned by the framers of the Constitution is obviously a system that extends "throughout" the State. It is equally clear that it is contemplated that such a system will be supported by appropriations made by the General Assembly, not only from the three sources enumerated in Section 135 of the Constitution, but by other appropriations, for the General Assembly is specifically authorized "to make such other appropriations for school purposes as it may deem best, to be apportioned on a basis to be provided by law." In addition, although the Constitution does not require any locality to levy a tax on property subject to local taxation, it is clear that it was contemplated that the public school system would be supported both by appropriations from the General Assembly, and by the levying of local school taxes—for Section 136 of the Constitution specifically grants to each county, city or town the power to raise additional sums by a tax on property subject to local taxation, not to exceed in the aggregate in any one year a rate of levy to be fixed by law.

From its inception, the public school system has been a joint State and local effort. The General Assembly discharges its obligation by establishing the system, providing for certain minimum standards, prescribing the duties of the State Board
of Education, the Superintendent of Public Instruction, Division Superintendents of Schools, County and City School Boards, and by appropriating from the State treasury the amount required to be applied, as aforesaid by Section 135 of the Constitution, and by making, from time to time, such other appropriations for school purposes as it deems best, providing in every instance the precise manner in which all funds so appropriated shall be apportioned and expended.

Without exception, the General Assembly has provided that, subject to certain rules, regulations and standards uniformly applied throughout the State, the moneys so appropriated would be apportioned to the localities, to be expended by the localities for school purposes along with certain other funds which the localities had levied and raised by local taxation.

The object of the provisions of Section 135, earmarking certain revenues to schools of the primary and grammar grades, was to assure that at least a minimum amount be applied for the benefit of all the children of the State in providing them with instruction in the lower grades. The same reasoning carried over into Section 136, whereby the localities were given the power to levy local taxes for school purposes, subject only to the limitation that from the proceeds of such local taxes such primary schools as were established should be maintained at least four months of a school year before any part of the local taxes assessed and collected could be devoted to schools of higher grade.

With specific reference to the Items of the current Appropriation Act under which the revenues of the Commonwealth of Virginia are being disbursed and apportioned to discharge the State's undertaking to maintain free public schools, your attention is directed to the language of these particular Items.

Items 138, 139 and 140, which in the aggregate appropriate $46,986,500 the first year of the biennium, and $53,803,150 the second year, are all "for basic appropriation for teachers' salaries." It is provided that in the apportionment of the sums under these items no county or city shall receive less than the amount prescribed by Section 135 of the Constitution, and, further, that the total shall be apportioned to the public schools by the State Board of Education under rules and regulations promulgated to effect certain specified provisions. Among other things, it is provided that the apportionment be on the basis of present State aid teaching positions; that the annual expenditure of funds derived from local sources for instruction in public schools be not less than a certain amount; that the counties and cities pay from local funds at least a certain percentage of the total amount expended for salaries of teachers and instructional personnel; and that a minimum salary schedule be maintained. Included also under Item 138 of the Appropriation Act are paragraphs (c) and (h), which read as follows:

"c. No apportionment from this item shall be made to any county or city except for payment of salaries of teachers or other instructional personnel in the public schools, or for payment of tuition in lieu of teacher or other instructional salaries under rules and regulations of the State Board of Education.

* * * * *

"h. Allotments of funds from this item and from Items 139 and 140 beyond the constitutional appropriation shall be paid to a county or city only after submission of evidence satisfactory to the State Board of Education that the amount for which the allotment is claimed has been or will be expended for the purpose designated and in full compliance with the terms and conditions set forth pursuant to this item."

It is apparent that the General Assembly, in making the appropriations aforesaid, assumed the operation of public schools, and the basic appropriation for teachers' salaries was made pursuant to the State's undertaking to maintain a free public school system. In so doing, the General Assembly included the revenues derived from the three sources directed to be applied to schools of the primary
and grammar grades, along with other appropriations, and applied or appropriated the entire sum for teachers' salaries, and provided that no apportionment be made except in accordance with the provisions of said paragraph (c), and that allotment of funds be paid as directed in paragraph (h).

It is reasonable to assume that the General Assembly concluded that it could best and most wisely discharge the mandate of Section 135 of the Constitution by including the amounts prescribed by said Section in a larger appropriation made for the performance of the most important function of any school system, to-wit; the instruction of children and the payment of the salaries of those charged with that responsibility. Accordingly, the Constitutional minimum was applied by including it in the basic appropriations for teachers' salaries. Furthermore, the General Assembly, recognizing the intent of the framers of the Constitution to provide, first, a minimum expenditure for the primary and grammar grades, relaxed its regulations and requirements to the extent of permitting allotment of such funds (the Constitutional minimum) without requiring compliance by the locality with certain rules and regulations which govern the appropriations made in Item 138 over and above such minimum.

I am, therefore, of opinion that:

1. The State Board of Education has the authority, under the current Appropriation Act, to allot to any county or city in Virginia, including one in which public schools may not operate for the session 1959-60, its proportionate share of the amount comprising the "Constitutional minimum" established under Section 135 of the Constitution of Virginia, without requiring submission of evidence that the amount for which allotment is claimed has been or will be expended for the purpose designated and in full compliance with the terms and conditions set forth in Item 138 of the Appropriation Act.

2. The State Board of Education is without authority to make allotment of any funds from Items 138, 139 and 140 of the Appropriation Act in excess of the "Constitutional appropriation" to any county or city which does not submit satisfactory evidence that the amount for which allotment is claimed has been or will be expended for payment of salaries of teachers or other instructional personnel in the public schools, or for payment of tuition in lieu of such salaries under rules of the State Board of Education, and in full compliance with the terms and conditions set forth under Item 138. Obviously, a locality which does not employ teachers or pay tuition is not complying with paragraph (c) of Item 138, and will be unable to submit the necessary evidence required by paragraph (h) of said Item as a prerequisite to allotment of funds beyond the "Constitutional appropriation."

3. It is provided by Section 186 of the Constitution of Virginia that all revenues of the State shall be paid into the State treasury and no money shall be paid out of the State treasury except in pursuance of appropriations made by law. The appropriations under Items 138, 139 and 140 were clearly and expressly made to the State Board of Education for teachers' salaries and tuition payments. Therefore, sums allotted to any county or city under these Items of the Appropriation Act, irrespective of whether the funds consist of the "Constitutional appropriation," which are allotted a locality without the submission of satisfactory evidence, or are those additional funds which are allotted only after submission of such evidence) can be expended only in accordance with the provisions of these Items, and as set forth in paragraph (c) of Item 138, for salaries of teachers or other instructional personnel in public schools, or for payment of tuition in lieu of teachers' or other instructional salaries, under rules and regulations of the State Board of Education. The payment of tuition which is permitted under paragraph (c) of Item 138 is a payment made in accordance with Section 22-219 of the Code of Virginia. A provision similar to paragraph (c) of Item 138 has been in various Appropriation Acts since 1952, and antedates the "scholarship grant program" under which students are permitted to obtain scholarship grants for
attendance at nonsectarian private schools or public schools located in another locality.

Your attention is also directed to Section 22-116 of the Code of Virginia, which provides that State funds which are applicable for the maintenance of public schools expressly embrace the sources of revenue referred to as the "Constitutional minimum." In this further connection, Section 22-137 of the Code directs that:

"All moneys appropriated by the State for local schools, unless otherwise specifically provided, shall be used exclusively for teachers' salaries."

While the language of the several provisions of the Appropriation Act involved is not as clear as could be desired, I am unable to find any exception to the statute directing State funds to be used exclusively for teachers' salaries other than that contained in Paragraph (c) aforesaid, providing for payment of tuition.

Might I respectfully suggest that in the preparation of the Appropriation Act for consideration by the General Assembly of 1960, attention be given to a revision of the language under the Items for basic appropriation for teachers' salaries? The language should be amended in light of developments which have occurred and conditions which we have reason to anticipate in the future. In particular, I would suggest that in appropriating the "Constitutional minimum" the General Assembly broaden the purposes for which these funds can be expended. While payment of teachers' salaries and making tuition payments are important, the money could well be used for "other school purposes" and still comply with Section 135 of the Constitution. I would recommend that the State Board of Education and the localities be given a wider latitude in their expenditure of the "Constitutional minimum," but, of course, within the framework of Section 135, which directs the application of the three sources of revenue to the "schools of the primary and grammar grades."

SCHOOLS—Appropriations For—One Participating Subdivision May Use Annual Basis and Other Monthly Basis. (192)

Honorable J. Gordon Bennett
Auditor of Public Accounts

I am in receipt of your letter of December 2, 1959, and various collateral documents in connection with the inquiry submitted to you by Mr. Rawls Byrd, Superintendent of Schools of Williamsburg-James City County, concerning the appropriation of funds for public schools operated jointly by the City of Williamsburg and James City County.

With respect to the specific question posed in your communication, I am of the opinion that funds for the operation of such schools may properly be appropriated on an annual basis by one of the participating political subdivisions and appropriated from the general fund by the other participating political subdivision on a monthly, quarterly, semi-annual or annual basis, pursuant to the provisions of Sections 22-127, 58-839 and 58-844 of the Code of Virginia (1950) as amended.

SCHOOLS—Bond Issue—Temporary Financing Pending Final Issue. (28)

Honorable Chester J. Stafford
Commonwealth’s Attorney for Giles County

This is in reply to your letter of July 17, 1959, which reads as follows:
"There was a school bond issue election held on May 20, 1959, in Giles County, Virginia. This election authorized the issuance of $2,350,000.00 in bonds. The County School Board of Giles County with the approval of the Board of Supervisors is anticipating borrowing on a temporary basis a part of this money from the First National Exchange Bank of Roanoke. I would like to know if this would be proper under the Public Finance Act of 1958, and specifically under Section 15-666.64 together with 15-666.68 of the Code of Virginia.

"I am enclosing a copy of the order of the Court approving the issuance of the bonds together with a copy of the order calling the election. I am also enclosing a copy of a letter from the First National Exchange Bank of Roanoke relative to this matter and call your attention especially to paragraph No. 6."

An examination of the Order of Court calling the bond issue, reveals that the following question was submitted to the voters:

"Shall bonds of the aggregate principal amount of $2,350,000, be issued in the name and on the credit of Giles County for the purpose of providing funds necessary for school improvements in said county, including the purchase of sites for school buildings or additions to school buildings, the construction of school buildings or additions to school buildings and the furnishing or equipping of school buildings or additions to school buildings, such bonds to be payable at such time, not exceeding thirty years after their date, as the County School Board shall prescribe?"

Sections 15-666.64 and 15-666.65 authorize temporary financing such as is contemplated by your county. You have referred to Section 15-666.68 which is applicable.

By reference to Section 15-666.15 I find that the word "unit" as used in these sections is defined as any county or municipality, and hence these sections are applicable to counties as well as municipalities.

It appears that the loans to be made by the First National Exchange Bank shall not be for a period of time in excess of two years from the date of the issue of the original loan, and that such borrowing by the county will be in anticipation of the issuance of the bonds authorized by the voters and in anticipation of the receipt of the proceeds of the sale of such bonds, which proceeds, I infer, to the extent necessary will be used to discharge the loan from the Bank. The voters have approved the creation of a debt by the county in the amount and for the purposes set forth in the question voted upon at the election. The proposed borrowing may, in my opinion, be considered as a part of the debt that has been authorized by the voters, and, therefore, in my judgment, the transaction is not repugnant to the provisions of Section 115 (a) of the State Constitution.

With respect to paragraph 6 contained in the letter from the Bank to Mr. C. M. Hale, Treasurer of Giles County, in which the Bank requires a certified copy of a joint resolution of the Giles County School Board and the Board of Supervisors, I assume the Bank has reference to a resolution that may be adopted by these bodies in separate meetings.

We suggest that before you consummate this transaction, you present it to the law firm that you engaged to pass upon the validity of the bond issue, in order to determine whether or not this temporary borrowing would in any way affect their opinion with respect to the bond issue.
This is in reply to your letter of August 20, 1959, which reads as follows:

"After receiving your letter of July 21, 1959, another question has arisen with respect to the proposed interim loan from The First National Exchange Bank of Roanoke. Even though this may duplicate some of the information contained in my prior letter, I am going to set out the facts in full in order to give you a clear picture of the circumstances surrounding the question.

"On May 20, 1958, the qualified voters of Giles County authorized the issuance of $2,350,000.00 in bonds to provide funds for school improvements in Giles County. This election was held pursuant to the provisions of Sections 22-167 through 22-188 of the Code of Virginia of 1950 then in effect.

"The County School Board of Giles County and the Board of Supervisors of Giles County did not deem it advisable at that time to sell the authorized bonds as provided in Sections 22-174 and 22-175, which, in effect, provided that the bonds shall be sold at public sale to the highest bidder.

"Said Section 22-167 through 22-188 made no express provision for interim loans until the authorized bonds were sold. However, the then Virginia Code Section 22-120 authorized temporary loans to County School Boards under very limited terms such as repayment within one year, the aggregate loans could not exceed one half the amount produced by the county school levy, etc.

"In 1958, the General Assembly passed the Public Finance Act of 1958 (Virginia Code Sections 15-666.13 through 15-666.68) which became effective June 27, 1958.

"Two pertinent sections of the Public Finance Act of 1958 are as follows:

"§§ 15-666.64 and 15-666.68 [text of these Code Sections omitted.]

"The First National Exchange Bank of Roanoke has agreed to make a loan of $750,000.00 to Giles County in the anticipation of the sale of the authorized bonds, provided such loan is authorized by law.

"The terms of the contemplated loan are as follows:

"(1) The loan will be evidenced by notes of the Giles County School Board, payable six months after date. The notes may be renewed from time to time, but no maturity shall extend beyond 24 months from the date of the first borrowing.

"(2) The notes will be in multiples of $100,000 in so far as possible, with advances being made as funds are needed for construction purposes.

"(3) Interest will be at the annual rate of 3%, subject to renegotiation at the maturity of each note.

"(4) The School Board has the right of anticipation, and repayment of any or all outstanding notes may be made at any time without penalty.

"(5) To conform with the requirements of the Code of Virginia, all funds advanced under this commitment shall be repaid in not more than 24 months from the date of the first borrowing.

"(6) This borrowing shall be authorized by a joint resolution of the Giles County Board of Supervisors and the Giles County School Board.
A certified copy of such resolution shall be furnished us prior to any funds being advanced. This resolution will be prepared by your attorney, subject to approval of our counsel.

"(7) Disbursements under this loan will be made by Cashier's check and it is not required that Giles County maintain a deposit account with this bank.

"(8) This commitment will remain outstanding for the maximum period of one year from the date of this letter.

"I would appreciate your advising me whether, in your opinion, the proposed temporary loan by The First National Exchange Bank of Roanoke to Giles County in anticipation of the sale of the authorized bonds would be a binding obligation backed by the full faith and credit of Giles County."

The question presented is not free from doubt. I do not feel that the clause "the powers conferred by this chapter shall be in addition and supplemental to the powers conferred by any other law" contained in Section 15-666.68 renders much aid in determining this question. This clause, in my opinion, is applicable to a situation where another existing statute authorizes a bond issue for some specific purpose. Under this clause such a statute could be disregarded and in lieu thereof the issuance of bonds could be carried out under Chapter 19.1 of Title 15. For example, a county may issue bonds of sanitary districts under Article 2 of Chapter 2 of Title 21 of water works systems under Chapter 2, Title 25, and under these statutes there are no provisions authorizing anticipatory loans such as are contained in Section 15-666.64. If the county wishes to have the power to borrow money in anticipation of issuance and sale of the bonds, it may disregard the provisions of Title 21 or Title 25, as the case may be, and proceed under Chapter 19.1 of Title 15. Therefore, in addition and supplemental to the power of the county to issue bonds under these Titles it may elect to proceed under Chapter 19.1. I think that the clause just quoted and discussed is applicable only to a situation such as I have attempted to illustrate.

Upon examination of the Title to Chapter 640 of the Acts of Assembly (1958), in which Chapter 19.1 was enacted, it will be noted that it is stated in the Title that the purpose of the Act is "to revise, rearrange, amend and recodify the general laws of Virginia, relating to the issuance of bonds and other funded indebtedness of counties, cities and towns * * * and to provide for the completion of certain acts of governing bodies and county school boards." This Act specifically repealed Article 2 of Chapter 9 of Title 22 of the Code, under which school boards were authorized to issue general obligation bonds and it also repealed Chapter 19 of Title 15 relating to bond issue of counties, cities and towns generally. The terminal section of Chapter 640 (Section 4) reads as follows:

"4. The governing body of any county, city or town which has heretofore done or taken any acts or proceedings for the issuance of bonds under the provisions of Chapter 19, Title 15, Code of Virginia, 1950, as amended, as it stood prior to the passage of this Act may complete such acts and proceedings and issue such bonds in the same manner as if this Act had not been passed or pursuant to the provisions of Chapter 19.1 of this Act.

"The county school board of any county which has heretofore done or taken any acts or proceedings for the issuance of bonds under the provisions of Article 2, Chapter 9, Title 22, Code of Virginia, 1950, as amended, as it stood prior to the passage of this Act may complete such acts and proceedings and issue such bonds in the same manner as if this Act had not been passed.""

The statutes that were repealed by Chapter 640 are in a different category from those statutes that were not repealed, such as the sanitary district and water works
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bond issue statutes used in the illustration appearing above. These repealed statutes are no longer existing laws except in so far as they are continued for the purpose of winding up and completing any proceedings commenced thereunder prior to their repeal. It seems logical and reasonable to assume that the General Assembly in revising, rearranging, amending and recodifying these statutes that were repealed intended to substitute for them all of the provisions of Chapter 19.1 and to make the provisions of this Chapter applicable in connection with the winding up and completion of proceedings already commenced under the repealed statutes. The provisions of Section 4 of Chapter 640 were obviously intended to make unnecessary a new bond issue or require proceedings already had to be undertaken a second time and to permit the bonds to be issued in the same manner as if Chapter 640 had not been passed. I do not think that the words “under the provisions of this chapter” contained in Section 15-666.64 should be given a limited construction restricting its application to bond issues actually issued under Chapter 19.1 and not as applicable to bond issues originally issued under Title 22 and which are specifically kept alive by the provisions of Chapter 640 of the Acts of 1958 for the purpose of completing the project already commenced.

A statute, under a well established rule, is to be construed so as to accomplish the purpose for which it is manifestly enacted. The manifest purpose as shown by the Title to the Act (Chapter 640, Acts of 1958) was to re-write the general laws with respect to bond issues then authorized but not yet completed as well as those bond issues initiated subsequent to the effective date of the Act, and, in general, to broaden the scope of county and municipal financing generally. I do not feel that it was the purpose of the legislation to create a different situation with respect to bond issues in process of completion at the time Chapter 640 became effective than that pertaining to bond issues commenced after the effective date of the legislation.

While, as I have indicated, the question presented is not entirely free from doubt, nevertheless, I am of the opinion that the proposed borrowing would be a valid act on the part of the county. If the transaction is consummated, it might be well for you to first consult with your representatives in the General Assembly and determine whether or not they would be willing to introduce a bill to amend and clarify the statutes so as to remove all doubt with respect to any temporary financing that may be done in connection with this bond issue or any other bond issues that are similar and at the same time validate all obligations issued under Section 15-666.64 in anticipation of the issuance and sale of bonds authorized under any of the repealed statutes.

SCHOOLS—Construction—With Literary Fund Loan Financing—Competitive Bidding Required. (261)

Literary Fund—Moneys Therein Are “State Funds” Within Purview of § 22-166.8 of Code. (261)

March 8, 1960

DR. DAVIS Y. PASCHALL
Superintendent of Public Instruction

I am in receipt of your letter of March 7, 1960, in which you call my attention to Sections 22-166.8 and 22-166.12 of the Code of Virginia (1950) as amended, and present the following inquiry:

“If a school project is constructed and financed through the use of Literary Fund loans in whole or in part, is competitive bidding required on such a project?”
In pertinent part, Section 22-166.12 of the Virginia Code prescribes that no contract "for the construction of any State-aid project shall be let except after competitive bidding." A State-aid project is defined in Section 22-166.8 of the Virginia Code in the following language:

"'State-aid project' means the construction of any building for school purposes or substantial addition to such a building for which State funds, either by appropriation, grant-in-aid or loan, are used or to be used for all or part of the cost of construction; . . ."

It is manifest from the above quoted statute that competitive bidding upon a school project of the type under consideration would be required if moneys in the Literary Fund constitute "State funds" within the meaning of Section 22-166.8 of the Virginia Code.

As presently constituted, the Literary Fund is established by Section 134 of the Virginia Constitution which in part prescribes:

"The General Assembly shall set apart as a permanent and perpetual literary fund, the present literary fund of the State; the proceeds of all public lands donated by Congress for public free school purposes; of all escheated property; of all waste and unappropriated lands; of all property accruing to the State by forfeiture, and all fines collected for offenses committed against the State, and such other sums as the General Assembly may appropriate; . . ." (Italics supplied).

Moreover, the responsibility for the management and investment of the Literary Fund is vested in the State Board of Education, all money belonging to the Fund is paid into the State treasury and transferred to the credit of the Literary Fund on warrants of the State Comptroller, the State Treasurer is the accountant of the Fund and custodian of all its securities, and any money which ought to be paid into the State treasury to the credit of the Literary Fund is recoverable with interest by the State Board of Education in the name of the Commonwealth through proceedings instituted and prosecuted by the State Comptroller. Sections 22-101 through 22-104, Code of Virginia (1950) as amended.

In light of the considerations outlined above, I am of the opinion that moneys in the Literary Fund constitute "State funds" within the meaning of Section 22-166.8 of the Virginia Code and that competitive bidding would be required in connection with a school project to be constructed and financed, in whole or in part, through the use of Literary Fund loans.

SCHOOLS—Employees—Daughter of School Board Member May Not be Employed as Teacher. (34)

MR. HAROLD W. RAMSEY
Superintendent, Franklin County Public Schools

This is in reply to your letter of July 23, 1959, in which you state that a daughter of a member of the Franklin County School Board was graduated from Radford College in June, 1958, and was employed as a teacher in the public school system of Roanoke City for the session 1958-59. She has applied for a similar position in Franklin County. You state that her father is now a member of the County School Board and has been a member for a number of years.

You have requested my opinion as to whether the employment of this young
lady by the School Board of Franklin County would be in violation of Section 22-206 of the Code of Virginia, since her father is a member of said board.

Under Section 22-206 it is unlawful for the school board of any county to employ or pay any teacher from the public fund, if such teacher is the daughter of any member of the school board. This section contains, among others, the following exception:

"This provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed by any school board prior to the inception of such relationship or relationships."

As I understand the fact in this case, this young lady did not teach in the Roanoke city school system prior to the session of 1958-59, and her father took office as a member of the school board prior to that time.

If I have stated the facts correctly, then, in my opinion, the school board would be in violation of this Code section should it employ this young lady.

SCHOOLS—Property—Disposition of Proceeds from Sale After City Annexes.

June 16, 1960

HONORABLE F. B. HUBER
Treasurer, Campbell County

This is in reply to your letter of June 10, which reads as follows:

"A recent court decree in an annexation suit of the City of Lynchburg vs. Campbell County left the county owning a school building within the present city limits. Campbell County school authorities are negotiating with Lynchburg authorities looking to the sale of the school property to the city.

"Should the property be sold to the city, I realize, of course, that the proceeds should be applied first to any outstanding bonded indebtedness against the school. However I would appreciate your opinion as to what disposition should be made of the balance of the proceeds, with particular reference to the following questions:

"1. Should the money be placed to the credit of the General Revenue Fund and be available for appropriation by the Board of Supervisors for any purpose?

"2. If the proceeds are not to be credited to the General Revenue Fund, must such money be appropriated by the Board of Supervisors before expended by the School Board?

"3. If not subject to appropriation, may the School Board expend the money for any school purpose, that is, for operations, capital outlay or debt service?"

With respect to question 1, I am of opinion that the proceeds of the sale of the property must be paid into the general fund of the county and that such proceeds are subject to appropriation for such purposes as the board of supervisors may determine. Section 22-161 of the Code does not specifically provide as to the disposition of the proceeds of the sale of school property. This office has formerly ruled that moneys received from the sale of school property should go into the school fund subject to the control of the school board. However, due to the amendments made to Section 15-575 and 15-577 of the Code at the 1959 Special Session of the General Assembly, it would seem that all public moneys
collected by the county are subject to the appropriation powers of the governing body. Moreover, at the recent session of the General Assembly, Senate Bill No. 294 was offered. This bill amended Section 22-147 of the Code so as to add the following paragraph:

"The school board of any county shall have the power to expand the proceeds of any such sale upon the warrant of its chairman drawn on the county treasurer, and no appropriation of such expenditure by the governing body of the county shall be required."

Although this bill was vetoed by the Governor, and, hence, did not become effective, it nevertheless indicates that the General Assembly was of the opinion that under the present law moneys received from the sale of school properties are subject to the appropriation powers of the governing body.

In view of the answer to question 1, I do not deem it necessary to comment upon questions 2 and 3.

SCHOOLS—Real Property Owned by County School Board—Subject to Police Power of Town. (88)

September 17, 1959

HONORABLE J. L. WALTHALL
Division Superintendent of Tazewell County Schools

I acknowledge receipt of your letter of September 5, 1959, which reads as follows:

"The Tazewell County School Board would appreciate an expression of your opinion regarding the jurisdiction of the Town of Tazewell, Tazewell, Virginia, over property owned by the Tazewell County School Board.

"The School Board, about five years ago, temporarily abandoned the old Tazewell Elementary School building for teaching purposes when other facilities became available. The board would like to protect itself if the old building, which is now needed, can be salvaged in such a way as to save the taxpayers of the county. No funds for this purpose are now available.

"Certain steps have been taken by the school board to make the building safe to permit time for the disposition of the problem when funds become available.

"I am attaching a file of the correspondence that will be self-explanatory."

The papers which you attached to your letter include an ordinance entitled "An Ordinance Providing For The Condemnation of Dangerous Buildings," which, I assume, was enacted by the Town Council under the powers conferred in the Charter of the Town of Tazewell contained in Chapter 358, Acts of Assembly, 1958. Article II of the Charter, in my judgment, authorizes the Council to adopt the ordinance under consideration. Section 15-6(5) of the Virginia Code also empowers the Council to pass such an ordinance.

Whether or not the building is in such a condition that it constitutes a violation of the ordinance is a factual question that I cannot pass upon.
In my opinion, property owned by the Tazewell County School Board would be subject to the jurisdiction of the town to the same extent as other property. The Board may not, in my judgment, claim immunity because it is a part of the county government. There is no statute to that effect.

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**SCHOOLS—Scholarship Grants—Constitutional—No Liability on Treasurer if Law Later Determined to be Unconstitutional.**

February 26, 1960

HONORABLE ERNEST P. GATES
Commonwealth's Attorney for Chesterfield County

This is in reply to your letter of February 24, 1960, which reads as follows:

"The County School Board of Chesterfield County by resolution adopted January 20, 1960, has approved 49 applications for scholarship aid pursuant to Chapter 53, Acts of Extra Session of the General Assembly 1959. The Board of Supervisors of Chesterfield County, by resolution, has appropriated a sufficient sum of money from the General Fund of the County to a special fund set up for the purpose to pay the persons entitled thereto and has directed the County Treasurer to pay the said amounts to the persons entitled thereto as shown on approved applications.

"The County Treasurer has requested me to advise him whether or not such payments are constitutional under both the Constitution of Virginia and the Constitution of the United States of America. If constitutional, should the amount paid be drawn on a School Board warrant countersigned by the Treasurer pursuant to resolution of the School Board under the provisions of § 22-115.24 of the 1950 Code, or County warrant drawn by the Board of Supervisors and countersigned by the Treasurer, or disbursed by the Treasurer by Treasurer's check drawn on the above mentioned special fund?

"Assuming that the payments, in your opinion, are constitutional, the Treasurer has requested that if in the future a Court of competent jurisdiction rules that the payments are not valid, would he, the Treasurer, become personally responsible for payments made prior to such decision?"

With respect to the constitutional questions raised in the second paragraph of your letter, such payments are authorized under the provisions of Section 141 of the Constitution of Virginia. The constitutionality of these payments under the Constitution of the United States has not been passed upon by the Supreme Court of the United States. I am of opinion, however, that the scholarship grant provisions of Title 22 of the Code of Virginia are not in conflict with any provisions of the federal Constitution.

Payments of scholarship grants are made upon warrants of the chairman of the school board and the clerk thereof in accordance with the provisions of Sections 22-73 and 22-75 of the Code of Virginia. Section 22-133, of course, is applicable in connection with the handling and disbursement of funds appropriated to the school board. Such funds may be expended pursuant to such rules and regulations as are promulgated by the State Board of Education as provided in § 22-115.24 of the Code.

With respect to the question presented in the third paragraph of your letter, I am of opinion that there would be no personal responsibility or liability upon the treasurer for any disbursements made by him pursuant to the scholarship grant provision of State law in the event such law should be subsequently determined to be in violation of any constitutional provision.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Scholarship Grants—Paid Out of General County Funds—Separate Fund for Accounting. (165)

November 25, 1959

HONORABLE ROBERT LEE SIMPSON
Commonwealth’s Attorney for Princess Anne County

This is in reply to your letter of November 23, 1959, in which you request my opinion with respect to the questions presented in a letter dated November 20, 1959 to you from Mr. Giles G. Dodd, Comptroller of Princess Anne County. Mr. Dodd’s letter is as follows:

“The Princess Anne County School Board has presented to this office for payment certain invoices covering scholarship grants for county children attending private nonsectarian schools and public schools in other localities.

“The Board of Supervisors has made no appropriation for these scholarship grants and it is my understanding, after reading Sections 22-115.1 through 22-115.20, that these grants cannot be paid from funds derived from a levy for the operation of schools but rather should be appropriated from the general county levy. (Princess Anne County has a $3.00 school levy and a $1.50 levy for general Government operations.)

“I should also like to point out that the county receives tuition payments from the City of Virginia Beach and the City of Norfolk for the students from these localities who are attending Princess Anne County Schools.

“My questions relating to the aforementioned sections are as follows:

1. Is it a requirement that scholarship grants must be paid from the general county levy or could they be paid from the tuition payments which the county receives from other localities?

2. For accounting purposes, should a separate ‘Scholarship Fund’ be set up to record the scholarship grants or should they be accounted for in one of the existing county funds?”

Sections 22-115.1 through 22-115.20 of the Code referred to by Mr. Dodd were repealed by the extra session of 1959 and in lieu thereof Chapter 7.2 of Title 22 of the Code was enacted. See Chapter 53, extra session, 1959.

I shall answer the questions presented by Mr. Dodd in the order stated by him:

1. Section 22-115.23 provides that the governing body of each county “shall appropriate out of the general tax revenues of the locality and out of the funds made available to the locality for such purpose by the State such amounts as may be necessary to provide scholarships of at least the minimum amount specified by § 22-115.26 of this chapter for children of school age residing in such locality within the meaning of § 22-218 of the Code of Virginia but who attend nonsectarian private schools in or outside such locality or public schools located outside such locality.”

The tuition payments received by the counties from other localities would, in my opinion, go into the county school fund and not into the general county fund. Therefore, I am of the opinion that the scholarship grants should be paid out of the general county funds and that no part thereof should be paid from the tuition payments which the county receives from other localities.

I believe that Section 22-115.24 provides the answer to the second question presented by Mr. Dodd. This section reads as follows:

“The funds made available for such scholarships shall be expended
by the local school boards pursuant to rules and regulations promulgated by the State Board of Education. Such funds shall be appropriated and recorded separately from funds made available to the school board for the maintenance and operation of the public schools and no funds appropriated for scholarships shall be used or be available to be used for the maintenance or operation of the public schools.

This section would indicate that a separate fund should be established for the purpose of paying scholarships. However, since this is an accounting question, I believe it would be advisable for you or Mr. Dodd to present the matter to the Honorable J. Gordon Bennett, Auditor of Public Accounts, who, I feel sure, will be glad to furnish you with his views. I understand that Mr. Bennett has made a thorough study of the accounting procedure appropriate to this subject.

SCHOOLS—Scholarships—Pupil Entitled to Freedom of Choice—School Attended Must Meet Board Standards. (75)

Mr. C. L. Capito
City Clerk and Auditor
City of Radford

This is in reply to your letter of August 24, 1959, which reads as follows:

"It will be appreciated if you will furnish me an interpretation of Section 2, Chapter 53 of the Acts of Assembly of Virginia, at a Special Session in the Spring of 1959.

"I am particularly interested to know if children going from one school locality to another are entitled to Scholarship Funds regardless of the possibilities of integration."

A pupil's entitlement to a scholarship under Chapter 7.2 of the Code of Virginia (Chapter 53, Acts of Special Session, 1959) is in no way dependent upon the possibilities of integration in the public school he normally would attend. Any person of school age is entitled to a scholarship for education in a non-sectarian private school or a public school of his selection. Any private school selected by a pupil must, of course, meet the standards established under the rules and regulations of the State Board of Education as promulgated under Section 22-115.25 of the Code (Section 4 of the Act).

The scholarships are available to all children of school age who are eligible to attend the public schools of this State. The policy of the State is set forth in Section 22-115.22 of the Code (Section 1 of the Act). This section reads as follows:

"The General Assembly, mindful of the need for a literate and informed citizenry, hereby declares that it is the policy of this Commonwealth to encourage the education of all of the children of Virginia. In furtherance of this objective, the General Assembly finds that in addition to providing instruction in the public schools, it is desirable and in the public interest that scholarships should be provided from the public funds of the State and localities for the education of the children in nonsectarian private schools and in public schools located outside of the locality where the children reside."
Under this section the children of Virginia have absolute freedom of choice in determining where they will pursue their education, subject, of course, to the school meeting the qualifications of law and the standards established by the State Board of Education.

SCHOOLS—School Boards—Contracting With Firm in Which Member of School Trustee Electoral Board Has Interest. (233)

HONORABLE ROBERT C. GOAD
Commonwealth's Attorney for Nelson County

February 10, 1960

This is in reply to your letter of February 5, 1960, in which you state that a member of the county School Trustee Electoral Board is a stockholder in a corporation operating an automobile sales agency; that the county School Board owns a number of school buses and that the agency in which the member of the Trustee Electoral Board has an interest is the only firm in your county which is in position to furnish parts for the repair of such buses; that this firm has bid on a competitive basis to furnish chassis to the School Board; and that a son of the Trustee actually manages the agency, although the Trustee owns a substantial amount of the outstanding stock.

You have requested my opinion as to whether or not the provisions of Section 22-213 of the Code prohibit the School Board from buying parts and chassis from this firm so long as the Trustee continues to hold a substantial interest in the firm.

Questions of this nature have been considered by this office on several occasions, and we have taken the position that Section 22-213 is applicable to members of the School Trustee Electoral Board. I enclose a copy of one of such opinions which was furnished the Commonwealth's Attorney of Pittsylvania County on August 21, 1951, and which was published in the Report of Attorney General for 1951-'52, at page 139.

In a case of this nature, it would seem that the State Board of Education would pass a resolution upon request of the county School Board, which would remove all doubt as to the validity of such transactions, and would be a protection for the Trustee.

SCHOOLS—School Boards—Execution of Legal Documents—Seals. (140)

HONORABLE PAUL HOUNSELL
Division Superintendent of Schools, Culpeper County

October 27, 1959

This is in reply to your letter of October 24, 1959, which reads as follows:

"It has been the custom in the past for each member of our school board to sign before a notary all legal documents such as deeds, petitions for sale of real estate, notes and right of ways.

"Our lawyer suggested that I write you and get your opinion as to the possibility of having our School Board, at a regular meeting, pass a motion authorizing the transaction and authorizing the Chairman of the Board to sign the documents for the Board."

Under Section 22-63 of the Code, the county school board is a body corporate and in your county the official name is County School Board of Culpeper County.
Section 22-48 of the Code requires the school board of any county to elect one of its members as chairman and on recommendation of the Division Superintendent to elect or appoint a competent person as clerk of the school board. These officers shall be selected annually.

Section 22-48.1 authorizes the school board in its discretion to select a vice-chairman and a deputy clerk who shall be empowered to act in all matters in case of the absence or inability to act of the chairman or clerk respectively or otherwise as may be provided in the resolution of the board.

In my opinion, the chairman and clerk of the school board should, in their official capacities, sign all documents such as you have mentioned. These documents may be executed in this manner:

"County School Board of Culpeper County

"By ........................................... Chairman

"Attest: ........................................... Secretary."

The Code does not provide that a county school board shall have a corporate seal, similar to the requirement with respect to corporations generally. I am advised that a number of local boards have adopted an official seal. I feel that a resolution adopting a seal and providing that it be affixed to all official documents, attested by the secretary, would be appropriate.

In all cases, however, before these officials execute any such documents on behalf of the board, there should be a resolution adopted by the board authorizing such action.

SCHOOLS—School Boards—Insurance Premiums—Refunds—To Which Fund Credited. (185)

December 14, 1959

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of December 9, 1959, in which you enclosed a letter to you, dated December 8, 1959, from the Honorable J. W. Wilson, Jr., Treasurer, Prince Edward County. You have asked for my opinion with respect to two questions raised in Mr. Wilson's letter to you, which reads as follows:

“Our school board has in past years been paying insurance on school buildings for three years in advance in order to get a discount on the premiums. They have now decided to reduce the coverage to one year. By so doing the school board will receive a refund of $3,000.00 to $5,000.00.

“I shall appreciate it if you will answer the following questions:

“(1) Should this insurance premium refund be placed in the General Revenue Fund, or should the School Fund, which is now balanced be reopened with this credit?

“(2) If this insurance premium refund is placed in either the General Revenue Fund or the School Fund, should the Board of Supervisors furnish me with a resolution of reappropriation, or a supplemental
appropriation, before I may sign any checks drawn by the School Board against it?"

I am advised that the Board of Supervisors of Prince Edward County lays a "unit" levy for all governmental purposes each fiscal year and that the total insurance coverage on school buildings was acquired by the School Board by purchasing "staggered" policies of insurance. Once the total amount of insurance coverage desired was determined, the County School Board purchased this amount of insurance in several policies, some for a three-year term, some for a two-year term and some for a one-year term. When each of these policies expired, a new three-year policy in the same face amount of insurance was purchased. In this fashion approximately one-third of the total insurance premium was paid each year, although the full amount of coverage was in effect at all times.

With reference to Mr. Wilson's first question, I am of the opinion that that portion of the total insurance premium refund now to be received which represents a return of premiums paid during the current fiscal year should be credited to the school fund and is available for expenditure during the current fiscal year by the County School Board without any additional appropriation by the County Board of Supervisors. This proportionate part of the total premium refund, if not expended by the School Board prior to the end of the fiscal year, would then "revert," and, pursuant to § 58-839, as amended, of the Code of Virginia, "be carried over to the succeeding fiscal years and shall be available for appropriation [by the Board of Supervisors] for any governmental purposes in those years."

As to the balance of the total insurance premium refund, which represents repayment of premiums paid out of appropriations made prior to the current fiscal year, I am of the opinion that these amounts are now available in the general fund for appropriation by the Board of Supervisors for any governmental purposes in accordance with the mandate of § 58-839.

It follows that the answer to Mr. Wilson's second question is that no resolution of reappropriation, or any supplemental appropriation, by the Board of Supervisors is required to authorize the expenditure by the School Board during the current fiscal year of funds received as a return of insurance premiums paid out during the current fiscal year. As to the balance of the total premium refunds, however, the Board of Supervisors should furnish the Treasurer with a resolution or ordinance appropriating such funds to the School Board before he should sign any checks drawn by the School Board against such funds.

SCHOOLS—School Boards—Liquidation of Capital Investments—Receipts Under Forest Reserve Act—Disposition. (209)

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

January 5, 1960

This is in reply to your letter of December 29, 1959, to which you attached a letter to you from the treasurer of Prince Edward county, in which he enclosed a copy of a letter from T. J. Mellwaine, Superintendent of Schools. The facts as presented by Mr. Mellwaine are as follows:

(1) In the month of August, 1959, the state treasurer paid to the county treasurer the sum of $4,169.19, under the provisions of Section 22-119 of the Code. This was the share payable to Prince Edward county from funds received under the Forest Reserve Act approved by Congress May 23, 1908.
(2) Since July 1, 1959, the Prince Edward County School Board has collected and turned over to the county treasurer the sum of $230.00 rent received from property owned by the school board.

(3) The school board received and turned over to the county treasurer during the same period the sum of $391.80 realized from the sale of surplus equipment.

(4) The school board contemplates selling additional surplus property.

The funds received from these sources have been credited to the general county fund.

In his letter to Mr. Wilson, Mr. McIlwaine contended that all funds received from such sources should have been credited to the account of the county school board and he requested that these funds be transferred from the general fund to the school fund. He further stated that the school board is of the opinion such funds would then be available for expenditure for public school purposes without specific appropriation by the board of supervisors. The school board plans to use these funds in payment of certain administrative costs such as salary and mileage due the Members of the School Board, salary due the Clerk of the School Board, salary due the Superintendent of Schools, compensation due Members of the Prince Edward County School Trustee Electoral Board and certain miscellaneous expenses of the school board.

In response to Mr. McIlwaine's letter, Mr. Wilson has presented these questions:

"(1) Should I transfer without an order from the Board of Supervisors, the funds mentioned in Mr. McIlwaine's letter, from the General Revenue Fund to the School Fund?

"(2) After the transfer has been made from the General Revenue Fund to the School Fund, should the Board of Supervisors furnish me with a resolution appropriating such funds to the School Board before I sign any checks drawn by the School Board against them?

"(3) Should I have a resolution of appropriation to the School Board from the Board of Supervisors before disbursing proceeds from sale of abandoned school buildings?"

You have requested me to advise you how these questions should be answered. Section 22-119 of the Code provides that funds received under this section shall be paid to the county treasurer and "such treasurer shall receive the same and place the funds to the credit of the public schools of the county."

In an opinion dated February 28, 1940, published in the Report of Attorney General for 1939-'40, at page 197, Attorney General Abram P. Staples rules that under the provisions of Section 676 of the Code—Section 22-147 of the Code of 1950—the proceeds of the sale of school property become the property of the school board and may be used by it for school purposes. I am in accord with this opinion. Any rent received by the school board from its property would, under this Code section, be available to the board for public school purposes.

In my opinion, moneys received by the county treasurer from such sale or rental should be placed to the credit of the county school board. Therefore, it follows that question (1) presented by Mr. Wilson is answered in the affirmative.

With respect to questions (2) and (3), I am of opinion that a board of supervisors has no control over such funds and that a county school board may expend them for the purposes indicated. No appropriation by the board of supervisors is required, since the funds under consideration were not derived from any of the sources contemplated in Chapter 18 of Title 15 and Chapter 17 of Title 58 of the Code. These chapters have reference to revenues realized from sources considered in the preparation of the annual budget, and are not applicable to the proceeds received from sale or rental of school properties.

You have referred to my opinion to you of December 14, 1950, relating to a rebate or refund received on account of the cancellation of certain insurance
policies. The opinion to which you refer is not in conflict with the views herein expressed. The refund of premium resulted from a mere change of mind with respect to the use of funds derived from the usual sources and appropriated for a specific purpose, whereas, in the present instance, the funds were originally expended for capital investments of the school board which have subsequently been liquidated, or, as in the case of the forest funds, specifically ear-marked by statute.

SCHOOLS—School Boards—Member of School Trustee Electoral Board May Not be Elected to and Serve on School Board. (211)

January 15, 1960

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth's Attorney for Appomattox County

This is in reply to your letter of January 14, 1960, which reads as follows:

"I will appreciate it if you will give me the benefit of the opinion of your office on the following question: 'in case a vacancy arises on the School Board for Appomattox County would it be proper for a member of the School Trustee Electoral Board to resign from the School Electoral Board and thereafter be appointed to the School Board of Appomattox County?""

It is provided in Section 22-69 of the Code, in part, as follows:

"No State or county officer, or any deputy of such officer, and no supervisor shall be chosen or allowed to act as a member of the county school board, provided that the provisions herein contained, shall not apply to county superintendents of the poor, commissioners in chancery, commissioners of accounts, registrars of vital statistics, notaries public, clerks and employees of the federal government in Washington, or officers and employees of the District of Columbia. * * *"

Under this section, as well as under the general rule of incompatibility, it would not be possible for a member of the School Trustee Electoral Board to be elected to and hold membership on the county school board. However, I know of no statute which would prevent a member of the School Trustee Electoral Board from resigning that office and subsequently being elected by the reorganized School Trustee Electoral Board to membership on the county school board.

SCHOOLS—School Boards—Property Held or Acquired by—Same Powers as Boards of Supervisors. (187)

December 17, 1959

HONORABLE A. D. JOHNSON
Commonwealth's Attorney for Isle of Wight County

This is in reply to your letter of December 14, 1959, which reads as follows:

"The Isle of Wight County School Board desires to purchase a certain parcel of real estate from the Treasurer of Isle of Wight County. The
REPORT OF THE ATTORNEY GENERAL

County does not have a County Manager form of government, but operates entirely under a Board of Supervisors.

"I will appreciate your opinion as to whether or not:

1. The School Board may purchase real estate from the Treasurer of the County under Section 15-504.2 of the Code, 1958 Supplement, if the purchase is approved in advance by the unanimous vote of the members of the Board of Supervisors and by the Judge of the Circuit Court as prescribed by Section 15-333 of the Code and Supplement, supra.

2. The provisions of Section 15-709.1, Code and Supplement, supra, apply to deeds conveying real estate to the School Board."

In my opinion both questions presented by you should be answered in the affirmative. Property acquired by the School Board may, in my judgment, be considered as property acquired by the County within the meaning of the Code sections which you have cited. You will note that in Section 22-161 of the Code relating to the sale of school property it is provided that:

"The school board shall have the same power to sell or exchange and convey the real and personal property of the county as the governing body of the county has with reference to the power of sale, exchange and conveyance of other county property * * *." 

By this language the General Assembly has classified school property as county property.

I wish to call your attention to § 22-150 of the Code which must be observed whenever the school board acquires any real property.

SCHOOLS—School Boards—Public Contracts—Member of Board Officer of Corporation. (150)

November 13, 1959

HONORABLE FERDINAND F. CHANDLER
Commonwealth's Attorney for Westmoreland County

This is in reply to your letter of November 4, 1959, in which you state as follows:

"Will you please give me your official opinion as to whether a School Board Member, who is also Secretary of a corporation (but not a stockholder) furnishing materials and supplies to the School Board, is an interested person in such corporation."

Subsequently, you have furnished us with additional information as follows:

"*The corporation in question does furnish building materials of all kinds to contractors for building school houses, and that it does also furnish building materials of all kinds direct to the School Board for repairs, which materials consist of roofing, nails, flooring, cement, and practically all kinds of timbers that are used in repairing buildings.

"The corporation is engaged in the building and supply business. It is the largest concern of its kind in the County, and I would say that it furnishes a majority of the materials which are used in building and repairing school buildings in this County."

Section 22-213 of the Code provides, in part, as follows:
"It shall also be unlawful for any firm or corporation, in which any member of the board or other officer, principal or teacher, mentioned in this section, is interested, or for any agent of such officers or persons, except by permission of the State Board evidenced by resolution spread on the minutes of such board, to be interested or concerned in any contract or matter mentioned in this section."

This section of the Code as you know provides that it shall be unlawful for any member of the school board to have a pecuniary interest directly or indirectly in certain contracts with the school board. The specific language quoted herein provides that it is unlawful for any corporation in which a member of the school board is interested to be interested or concerned in any contract or matter mentioned in said Code section.

This office has held on a previous occasion in interpreting Section 15-504 of the Code, which is similar to Section 22-213, in so far as public contracts are concerned, that where a mere employee of a corporation was a member of the board of supervisors that the interest of the employee was too remote to come within the prohibitions of this section. I am of the opinion, however, that where the board member is an officer of a corporation, even though he may not own stock in the corporation, that the prohibitions of the statute would apply, especially in the case of a corporation that furnishes supplies to the school board to the extent stated in your second letter.

I believe that it would be well for the school board of your county to seek the permission of the State Board of Education before entering into any further contracts with the corporation in question so long as the board member continues to be an officer in the corporation.

SCHOOLS—School Boards—Water and Sewer Facilities Must be Provided by—May Not Make Loan to Town to Finance Construction. (289)

Counties—Boards of Supervisors—School Water and Sewer Facilities—May Contract with Town for Construction and Reimbursement by Town of its Share. (289)

March 23, 1960

HONORABLE CHESTER J. STAFFORD
Commonwealth's Attorney for Giles County

This is in reply to your letter of March 18, 1960, which reads as follows:

"The Giles County School Board is preparing to construct a new high school which will be located approximately one mile east of the town of Pearisburg, Giles County, Virginia, on U. S. Route 460, at a cost of approximately $1,000,000.00 including equipment.

"At the particular location of the new school there is no water supply and it is questionable whether or not wells in this area would be successful. Therefore, the Giles County School Board wishes to enter into a contract with the Town of Pearisburg for the laying of a water line from the corporate limits of the town of Pearisburg to the new school, as well as a sewer line. The cost of this work will be approximately $50,000.00 and it is the opinion of the school board that this cost would be much cheaper than endeavoring to construct its own wells and sewage disposal plant."
"The Town of Pearisburg and the school board, after many conferences, have agreed on the following proposal:

"'1. The Town of Pearisburg, Virginia will construct or have constructed a ten inch (10") water main to the south property line of the new Giles High School in accordance with Survey Plan "E" and an eight inch (8") sanitary sewer main to the west property line of the new Giles High School in accordance with Survey Plan "S", provided the School Board of Giles County agrees to pay, at a specified date, to the Town of Pearisburg, Virginia the sum of fifty thousand dollars ($50,000.00).

"'2. The School Board of Giles County will lend to the Town of Pearisburg, at an interest rate equivalent to its new school bond rate, twenty-five thousand ($25,000.00). This sum is to be used toward construction of a 10" water main within the corporate limits and is to be repaid in cash, with interest, over a six (6) year period.

"'3. All fees charged for connecting additional laterals to the 10" main outside the corporate limits, exclusive of the actual cost to the Town of Pearisburg any work performed will be equally divided by the Town of Pearisburg and the School Board of Giles County for a period of ten (10) years commencing with the beginning of operation of said 10" main.'

"As you see from paragraph 1, the school board would pay for the water and sewer lines from the corporate limits of the town of Pearisburg to the new school and after the lines are completed they would be a part of the town water and sewage system.

"From paragraph 2 you will see that the town will have to borrow from the school board the sum of $25,000.00 to increase its lines within the corporate limits in order to meet the requirements necessary by the fire code. This sum would be repaid to the school board over a six year period.

"I would appreciate an opinion from you as to whether or not the school board may legally enter into the agreement with the town of Pearisburg. Your immediate attention to this matter and your opinion will be greatly appreciated."

Under § 22-72 of the Code, county school boards have authority to provide for the equipping of necessary school buildings and appurtenances, and, therefore, have authority and duty to provide adequate sewage facilities. See Opinions of Attorney General, 1950-'51, at page 243; 1956-'57, at page 219. School boards under this section are also authorized and it is their duty to provide all public schools with an adequate and safe supply of drinking water. Expenditures by school boards must, if the school funds are derived from a unit or general levy, be within the limits of specific appropriations made by the governing body of the county. See § 58-839 of the Code, as amended by Chapter 32, Extra Session of 1959. Under the provisions of § 22-128 of the Code the governing body of a county may levy a special county tax, or a special district tax, as the case may be, for the purpose of raising funds for capital expenditures.

I do not find any provision under which a county school board may enter into a contract with a town in the manner and upon the terms outlined in your letter. However, under the provisions of Chapter 335, Acts of 1934, which is contained in §§ 15-724, 15-725 and 15-726, a board of supervisors and the council of a town may, in my opinion, enter into an agreement of the nature contemplated. In my opinion it will be necessary for the board of supervisors to be a party to such a contract, and it may, in my judgment, authorize the school board to join in the agreement with the town.

With reference to your question 2, I am not aware of any statute authorizing a board of supervisors to make a loan to a town. I am of opinion, however, that the governing body of a county, under the provisions of the sections of the
SCHOOLS—School Trustee Electoral Boards—Contracts—Architect Member Should Receive Approval of State Board of Education for Contracts with Local School Boards. (238)

February 12, 1960

Honorale Edw. H. Richardson
Commonwealth's Attorney of Roanoke County

This is in reply to your letter of February 9, 1960, which reads as follows:

"I have been asked to get your opinion as to whether or not a member of a School Trustee Electoral Board can contract with the School Board of the County in which he is Trustee for his services as an architect; also, if he cannot contract with the School Board in the County where he is a Trustee, is he prohibited from contracting with other School Boards in the State."

This office has held on several occasions that the prohibitions contained in the provisions of Section 22-213 of the Code apply to members of the school trustee electoral board to the same extent as they would apply to a member of the school board of the county. However, the service of an architect in connection with the construction of a schoolhouse by the county school board is not in specific terms embraced in this Code section. It would seem that such service is included in the spirit of the section and, in my opinion, it would be more prudent in this case to secure the consent of the State Board of Education as provided in Section 22-213.

The section provides that no member of the school board or any other school officer may have any pecuniary interest, directly or indirectly, in any contract for building a public schoolhouse. It might be held that the architect, although he has not contracted to build a public schoolhouse, has a pecuniary interest either directly or indirectly in the contract.

You probably are familiar with the case of Commonwealth v. Barrow, 118 Va. 257, 87 S. E. 576, in which the court held that this statute is of a high penal character and is to be construed strictly. Under a strict interpretation it may be that the architect would not come within the prohibitions of this Code section. In order to remove all doubt, as I have suggested above, I believe it would be advisable for the architect to obtain consent of the State Board of Education.

With respect to your second question, it will be noted that the prohibitions therein contained apply to any contract for building a public schoolhouse, etc., to the public schools of this state. It does not appear, therefore, that the prohibitions contained in this section are limited to the county in which the school board constructing a schoolhouse has jurisdiction. I believe, therefore, that the prohibition would be equally applicable to contracts outside of the county in which the architect serves as a member of the school trustee electoral board.
REPORT OF THE ATTORNEY GENERAL

SCHOOLS—Separate School Districts—Abolition of—Rates of Utility Charges.

(194) December 29, 1959

HONORABLE FLOYD S. KAY
Division Superintendent of Rockbridge County Schools

This will acknowledge receipt of your letter of December 26, 1959, which reads, in part, as follows:

"We are involved in the operation of a very costly system of public education here in Rockbridge County. Several factors over which the writer has very little control are responsible for this situation. I am seeking your advice as to what steps we might take to get relief from the following conditions:

"1. The existence of a separate School District within the school division of Rockbridge County. This set-up as you know leads to duplication of educational costs. Would it be possible to enact legislation in the January Session of the General Assembly abolishing all separate School Districts in Virginia except for the purpose of representation?

"2. Rockbridge County with much larger school units than the Town of Lexington has to pay 20¢ per kw. hour for electric current as against 14¢ for the Town of Lexington. This, of course, is not peculiar to the Town of Lexington and Rockbridge County only, as this condition exists throughout the State.

"3. Gas rates for our public schools are the same as for any commercial establishment."

With respect to your question (1), Chapter 5 of Title 22 of the Code, contains the provisions relating to school districts. Section 22-43 of this Chapter preserves the special school district of Lexington. However, under the provisions of Section 22-43.1 of the Code, the special school district of Lexington may, by ordinance of the Town Council and by and with the approval of the County School Board and the State Board of Education, be dissolved as a separate school district and become a part of the county school unit.

The General Assembly may, by an appropriate act, abolish any or all of the special school districts, or enact any legislation with respect to school districts not in conflict with Section 133 of the State Constitution.

With respect to your questions (2) and (3), the State Corporation Commission has authority to regulate the rates to be charged by public utilities engaged in furnishing gas and electric services.

SCHOOLS—Substitute Teachers—Wife of Member of School Board May Not be Employed as—Substitute Not "Regularly Employed" (111)

October 6, 1959

HONORABLE J. THOMAS WALKER
Superintendent, Spotsylvania County Schools

This is in reply to your letter of October 2, 1959, which reads as follows:

"Mrs. John R. Alrich has asked me about her eligibility to be employed as a substitute teacher. Our school board does not give a contract for substitute teaching but principals simply call the substitute teachers as need arises. Mr. Alrich is a member of the Spotsylvania
County School Board and Mrs. Alrich did some substitute teaching prior to the time he became a member of the school board.

"Section 22-206 indicates that a teacher who was employed prior to the time her husband became a member of the school board would be exempted from this section. However, occasional employment is questionable. It seems that the report of the Attorney General, 1938-39, Page 224, had this to say: 'The provision excepting a relative employed prior to the effective date of the statute refers to one who has been employed under a contractual arrangement and certainly one who has been regularly employed. And one who has merely done occasional work for the board and never on a contractual basis is not exempted.'

"I shall appreciate an up-to-date opinion as to whether it would be legal for Mrs. Alrich to be paid by the school board for substitute teaching services."

Subsequent to the opinion to which you refer, this statute (Section 22-206 of the Virginia Code) has been amended, and it now reads as follows:

"It shall not be lawful for the school board of any county, city or of any town constituting a separate school district to employ or pay any teacher or other school board employee from the public funds if such teacher or other employee is the father, mother, brother, sister, wife, son, daughter, son-in-law, daughter-in-law, sister-in-law or brother-in-law of the superintendent, or of any member of the school board. This provision shall not apply to any such relative employed by any school board at any time prior to June twenty-first, nineteen hundred thirty-eight. This provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed by any school board prior to the inception of such relationship or relationships. If the school board violates these provisions, the individual members thereof shall be personally liable to refund to the local treasury any amounts paid in violation of this law, and such funds shall be recovered from members by action or suit in the name of the Commonwealth at the relation of the attorney for the Commonwealth. Such funds, when recovered, shall be paid into the local treasury for the use of the public schools."

You will note that the prohibitions of the statute do not apply to persons who have been regularly employed by any school board prior to the taking of office by a member of the school board who is related in one of the prohibited degrees to such persons. Attorney General Staples, in the opinion which you cited, took the position that prior regular employment was essential in order to come within the exemption. Since the statute has been amended to include a provision specifically adopting Mr. Staples' interpretation, I am of the opinion that prior service or employment as a substitute teacher would not bring a person within the exception.

SCHOOLS—Teachers—Daughter of Member of School Board May Continue Interrupted Employment Begun Before Parent's Election and Qualification as Member. (110)

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney for Rockbridge County

This is in reply to your letter of October 1, 1959, to which is attached a letter
from the Superintendent of Schools of Rockbridge County, which letter reads as follows:

"Miss X taught as a regular teacher in the public schools of Virginia during the sessions 1940-41 & 1941-42. After that time she was married and dropped out of the teaching profession. She is now interested in returning to the teaching profession. We have a vacancy and would like very much to offer her employment.

"About six years ago, however, her Father became a member of our School Board. The question which I should like to have settled is this, can she be legally employed in the school system of which her Father is a School Trustee? She was formerly employed in another division.

"I shall appreciate it very much if you will read Section 22-206 of the Virginia School Laws and let me have your reaction to this case at your earliest convenience."

Section 22-206 of the Virginia Code, as amended by Chapter 635 of the Acts of Assembly of 1958, reads as follows:

"It shall not be lawful for the school board of any county, city or of any town constituting a separate school district to employ or pay any teacher or other school board employee from the public funds if such teacher or other employee is the father, mother, brother, sister, wife, son, daughter, son-in-law, daughter-in-law, sister-in-law or brother-in-law of the superintendent, or of any member of the school board. This provision shall not apply to any such relative employed by any school board at any time prior to June twenty-first, nineteen hundred thirty-eight. This provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed by any school board prior to the inception of such relationship or relationships. If the school board violates these provisions, the individual members thereof shall be personally liable to refund to the local treasury any amounts paid in violation of this law, and such funds shall be recovered from members by action or suit in the name of the Commonwealth at the relation of the attorney for the Commonwealth. Such funds, when recovered, shall be paid into the local treasury for the use of the public schools."

The italicized language in this section has been the subject of consideration in previous opinions. One of these opinions, which is dated July 8, 1957, and published in the Report of the Attorney General for 1957-'58, at page 250, discusses the term "regularly employed." I enclose copy of this opinion.

Statutes of this nature should be strictly construed against rendering a person ineligible for employment. I do not think that the phrase "has been regularly employed" should be construed to mean that such person must have been employed during the most recent, or the next preceding, school session. I think that the phrase is intended to except from the provisions of the statute those persons whose qualifications have been considered and passed upon favorably by a school board on which there was no member who was related to the teacher in any of the degrees mentioned. Once a teacher has been regularly employed by any school board of this State and has for justifiable circumstances retired from the teaching profession for a period of time, I do not believe that it is the intention of the statute to prevent such person from being re-employed merely because some relative within the prohibited degree has in the meantime become a member of the school board.
REPORT OF THE ATTORNEY GENERAL

In my opinion it would not be a violation of the Code section under consideration for the school board to employ the teacher in question.

SCHOOLS—Teachers—Employed Prior to Marriage to Son of Member of School Board. (203)

HONORABLE R. P. REYNOLDS
Division Superintendent,
Carroll County Schools

January 8, 1960

This will reply to your letter of January 6, 1960, in which you inquire whether or not a daughter-in-law of a member of the Carroll County School Board may be employed by the board as a teacher or substitute teacher without violating the provisions of Section 22-206 of the Virginia Code. The specific situation concerning which you inquire is outlined in your communication in the following language:

"While single Lillie Pearl Wilson taught the full school term of 1949-50 at Fries, Virginia. In 1950-51 she taught the school term in North Carolina. She taught the school term of 1951-52 in Albemarle County, Virginia. After she had signed this contract to teach in Albemarle County she was married in August 1951 to George Burton Cooley, son of Mrs. Mary K. Cooley who at that time was and has remained to this date a member of the Carroll County School Board. Mrs. Lillie Pearl Wilson Cooley has not taught school since 1951-52."

In pertinent part, Section 22-206 of the Code of Virginia (1950) as amended prescribes:

"It shall not be lawful for the school board of any county, city or of any town constituting a separate school district to employ or pay any teacher or other school board employee from the public funds if such teacher or other employee is the father, mother, brother, sister, wife, son, daughter, son-in-law or daughter-in-law, sister-in-law or brother-in-law of the superintendent, or any member of the school board. This provision shall not apply to any such relative employed by any school board at any time prior to June twenty-first, nineteen hundred thirty-eight. This provision shall not apply to any person within such relationship or relationships who has been regularly employed by any school board prior to the taking of office of any member of such board or division superintendent of schools, or who has been regularly employed by any school board prior to the inception of such relationship or relationships." (Italics supplied).

It seems clear from your letter that the daughter-in-law concerning whose prospective employment you inquire was regularly employed by a school board in this State prior to the inception of the relationship under consideration. In this connection, I am forwarding to you an opinion of this office, dated May 22, 1958, to the Honorable Baxley T. Tankard, Commonwealth's Attorney for Northampton County, in which a situation substantially similar to that presented in your communication was discussed. In light of the language of Section 22-206 italicized above and the interpretation placed upon this provision in the enclosed ruling, I am of the opinion that the proposed employment of Mrs. Lillie Pearl Wilson Cooley by the School Board of Carroll County would not violate the statute in question.
MISS MARTHA BELL CONWAY
Secretary of the Commonwealth

I have considered the question presented in your letter of November 20, 1959, relating to the use of the State Seal by Northern Neck Regional Planning and Economic Development Commission on its stationery. This Commission is organized under the provisions of Article 1, Chapter 25, Title 15 of the Code and is a governmental agency of the participating political subdivisions. Under Section 15-891.3 of the Code the Governor, in his discretion, may furnish financial help to such Commissions upon approval of the Commissioner, Division of Industrial Development, formerly Division of Planning and Economic Development.

These agencies are of a public nature, established for the purpose of promoting the industrial development of the participating localities and of the State.

In my opinion, none of the prohibitions of Article 2, Chapter 10, Title 18 of the Code are applicable to such organizations.

SEGREGATION—Public Assemblages—Drug Stores, Restaurants, etc. Not Within Ambit of Section 18-327 of Code. (412)

HONORABLE ARMISTEAD L. BOOTHE
Member of Senate

HONORABLE ROBERT C. FITZGERALD
Commonwealth's Attorney for Fairfax County

I am in receipt of your letters of recent date in which you inquire whether or not drug stores, variety stores, restaurants, lunch counters or cafeterias are embraced within the phrase "place of public entertainment or public assemblage" as that phrase is utilized in Sections 18-327 and 18-328 of the Virginia Code.

Sections 18-327 and 18-328 of the Virginia Code comprise Article 8, Chapter 9, Title 18 of the Code of Virginia (1950) and respectively provide:

"§ 18-327.—Every person, firm, institution or corporation operating, maintaining, keeping, conducting, sponsoring or permitting any public hall, theatre, opera house, motion picture show or any place of public entertainment or public assemblage which is attended by both white and colored persons shall separate the white race and the colored race and shall set apart and designate in each such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage certain seats therein to be occupied by white persons and a portion thereof, or certain seats therein, to be occupied by colored persons and any such person, firm, institution or corporation that shall fail, refuse or neglect to comply with the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not less than one hundred dollars nor more than five hundred dollars for each offense." (Italics supplied).

"§ 18-328.—Any person who fails, while in any public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage, to take and occupy the seat or other space assigned to them in pursuance of the provisions of the preceding section by the
manager, usher or other person in charge of such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage or whose duty is to take up tickets or collect the admission from the guests therein, or who shall fail to obey the request of such manager, usher or other person, as aforesaid, to change his seat from time to time as occasion requires, in order that the preceding section may be complied with, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than ten dollars nor more than twenty-five dollars for each offense. Furthermore such person may be ejected from such public hall, theatre, opera house, motion picture show or other place of public entertainment or public assemblage by any manager, usher or ticket taker, or other person in charge of such public hall, theatre, opera house, motion picture show or place of public entertainment or public assemblage, or by a police officer or any other conservator of the peace, and if such person ejected shall have paid admission into such public hall, theatre, opera house, motion picture show or other place of public entertainment or public assemblage, he shall not be entitled to a return of any part of the same." (Italics supplied).

Initially, it should be noted that the above quoted statutes are penal in character and must be strictly construed. Moreover, the rules of ejusdem generis and noscitur a sociis are clearly applicable in construing the particular phrase to which reference is made in your communications. When the statutes under consideration are interpreted in light of these principles, I am constrained to believe that your inquiries should be answered in the negative.

So far as I have been able to ascertain, the leading case in Virginia involving the application of the above stated rules of construction to a penal statute is Gates and Son Co. v. City of Richmond, 103 Va. 702, 49, S. E. 965. In that case, the defendant, a corporation whose principal place of business was located on Fourteenth Street in the city of Richmond, was convicted in the trial court for an alleged violation of a penal ordinance of the city prohibiting any person from constructing or placing "any portico, porch, door, window, step, fence, or other projection" which extended into any street. The specific obstruction there under consideration was a movable "gang-plank" or "skid" some twelve feet in length, which extended from the front door of defendant's place of business across the sidewalk to delivery wagons in the street.

Utilizing the same rules of construction which I believe are indispensable to the proper resolution of the questions you present, the Supreme Court of Appeals of Virginia reversed the judgment of conviction entered by the trial court. With respect to the character of the ordinance under consideration and its proper construction, the Court pointed out (103 Va. at 704):

"This is a penal ordinance, and is, therefore, to be construed strictly. It is not to be extended by implication, and must be limited in its application to cases clearly described by the language employed. The books abound with cases illustrating this principle, which is of universal application, except in particular instances in which the doctrine has been modified by statute. . . .

* * *

"These and many other cases which could be cited to the same effect, tend to illustrate the jealously with which courts regard any substantial departure from this time-tested canon of construction. Its violation involves a most dangerous innovation, and places persons accused of crime at the mercy and arbitrary discretion of the judge who may chance to preside in the particular case."
In support of this view, the Court quoted the following language of Marshall, C. J., in *United States v. Wiltberger*, 5 Wheat. 76, 5 L. Ed. 37:

"The rule that penal laws are to be construed strictly is, perhaps, not much less old than construction itself. It is founded in the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not the judicial, department. . . . The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves do not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so.

"It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of kindred character with those which are enumerated."


The Court also pointed out that the "kindred principles" of *ejusdem generis* and *noscitur a sociis* must also be considered in ascertaining the correct interpretation of the ordinance there under consideration. These two rules of construction are well stated in 17 M. J. 325, Statutes: Section 62 and 17 M. J. 327, Statutes: Section 63, respectively, in the following language:

"When a particular class of persons or things is spoken of in a statute and general words follow, the class first mentioned must be taken as the most comprehensive, and the general words treated as referring to matters ejusdem generis with such class, the effect of general words when they follow particular words being thus restricted. Things exceptional in character are never legally deemed to be included or embraced in general terms of disposition, prohibition or regulation of a class or classes of normal or ordinary subjects mentioned. This principle is the basis or meaning of the rule ejusdem generis.

* * *

"It is a fundamental rule of construction that in accordance with the maxim 'noscitur a sociis' the meaning of a word or phrase may be ascertained by reference to the meaning of other words or phrases with which it is associated. Language, though apparently general, may be limited in its operation or effect where it may be gathered from the intent and purpose of the statute that it was designed to apply only to certain persons or things, or was to operate only under certain conditions.

"In the interpretation of statutes, words and phrases therein are often limited in meaning and effect by necessary implications arising from other words or clauses thereof. . . . Also, a specific enumeration of words or objects, as a rule, controls general words which follow and limits them in their operation to others of like kind."


Having indicated the various rules of construction requisite to the proper resolution of the question presented in the *Gates* case, supra, the Court concluded (103 Va. at 707):
"Applying the foregoing well-settled principles to the case in judgment, it is quite apparent that the offense charged is not embraced by the provisions of the ordinance under consideration. The ordinance is plainly intended to apply to obstructions and encroachments on the streets of a permanent character, and cannot without unwarranted enlargement of the ordinary scope and meaning of the language used, be made to embrace temporary obstructions such as are caused by the use of skids and similar appliances employed in loading and unloading wagons.

"If in the judgment of the city council the use made of the streets in this instance amounts to an undue interference with the rights of the public, the evil can be remedied by appropriate legislation. But the courts must construe the ordinance as they find it, and cannot enlarge its operation to meet the exigencies of particular cases."

Analysis of the language of Sections 18-327 and 18-328 of the Virginia Code furnishes significant internal support for the view that the rules of ejusdem generis and noscitur a sociis apply with special emphasis in delineating the proper scope of these statutes and that the general phrase "any place of public entertainment or public assemblage" must be interpreted as restricted to places of the same class as those denominated by the immediately preceding specific terms. Although the general phrase in question is repeated seven times in the two enactments, it is never isolated from—but in each instance appears in conjunction with—the antecedent specific terms "public hall, theatre, opera house" and "motion picture show". It is manifest that these specific terms embrace places of public entertainment customarily attended by large groups of people who are usually present collectively for protracted periods of time. By contrast, drug stores, variety stores, lunch counters, restaurants and cafeterias are not places of public entertainment and are usually attended by groups of individuals who are present only temporarily for the purpose of inspecting or purchasing merchandise or meals. Certainly, the particular establishments concerning which you inquire are not expressly embraced in the statute, and I am constrained to believe that such establishments are not of the same class as those which are specifically mentioned. Moreover, as previously indicated, the statutes under consideration must be limited in their application to cases clearly described by the language employed, and the scope of the enactments may not be extended by implication.

In light of the principles heretofore discussed and the decision of the Supreme Court of Appeals of Virginia in Gates and Son Co. v. City of Richmond, supra, I am of the opinion that drug stores, variety stores, restaurants, lunch counters and cafeterias should not be deemed to be included within the ambit of Sections 18-327 and 18-328 of the Virginia Code.

SHERIFFS AND SERGEANTS—Capias Pro Fine—Officer Must Accept Tender of Cash. (94)

Honorable Robert L. DeHaven
Sheriff of Frederick County

I am enclosing copies of three opinions relating to the collection on a capias pro fine which you requested in your letter of September 5, 1959.

I feel that the opinion of February 24, 1954, which was furnished to you, requires clarification with respect to the obligation of an officer executing a capias pro fine to accept payment thereof. In that opinion, the statement was made that in view
of Section 19-325 of the Code an officer executing a writ of that nature is not obligated to accept money from the defendant prior to taking him before a person authorized to take bond in criminal cases. The Code section in question is as follows:

"A constable or sheriff shall in no case receive any fine or costs imposed by a trial justice, except under process duly issued, but the same may be paid to the justice before he commits the defendant to jail in default of such payment." (Italics supplied.)

A capias pro fine is a process within the meaning of this section of the Code and, in my opinion, whenever the defendant tenders to the officer the total amount of the fine and costs due under such process, there is a duty upon the officer to accept the money. As stated in 12 C.J.S., at page 1120:

"A capias pro fine (literally, 'you take for the fine') is a writ in all respects an execution, running in behalf of the commonwealth for the benefit of the governmental agency or party entitled thereto, for the collection of a fine imposed by judgment. It is a substitute for a fieri facias, carrying with it not only a summary order to collect the judgment, but to take the defendant into custody and confine him until it is satisfied in the manner provided by law."

Section 19-328 of the Code requires the officer to pay the money received by him under a writ of capias pro fine to the clerk of the court from which such process issued, on or before the return day of the process. Section 19-331 requires the officer to give an official receipt to the person making the payment. These Code provisions justify the conclusion that an officer may not refuse to accept payment of a fine from the person named as defendant in a writ of capias pro fine.

As you will note from the opinion furnished to Honorable S. A. Cunningham, Judge of the County Court of Louisa County, a defendant named in a capias pro fine may satisfy the same by making payment to the sheriff or other officer to whom the process has been delivered for execution.

SHERIFFS AND SERGEANTS—Compatibility of Offices—Deputy May Not Serve as Dog Warden. (162)

HONORABLE A. DUNSTON JOHNSON
Commonwealth's Attorney for Isle of Wight County

This is in reply to your letter of November 20, 1959, which reads as follows:

"I will appreciate your opinion as to whether or not the same person may hold, at the same time, the positions of dog warden under Section 29-184.2 of the Code and either a part or full time deputy sheriff and receive compensation for both positions."

Section 15-486 of the Code is controlling herein. This section specifically provides that a sheriff shall not hold any other public office, elective or appointive. Our Supreme Court in the case of Board of Supervisors v. Lucas, 142 Va. 84, 91 has stated that:

"In contemplation of law both organic and statutory, a sheriff and a deputy are one. A deputy can only come into being by virtue of the appointment of a sheriff."
REPORT OF THE ATTORNEY GENERAL

Since a sheriff may not hold the office of game warden, it is manifest that a deputy may not hold such office. Paragraph (5) of this Code section authorizes a deputy sheriff to hold the office of town sergeant. This clearly implies that a deputy sheriff may not hold any other office.

SHERIFFS AND SERGEANTS—Deputies and Employees—May Serve as Notaries Public. (68)

HONORABLE JESSE O. BOLLING
Sheriff of Wise County

August 21, 1959

I have received your letter of August 19, 1959, in which you ask whether or not employees or deputies who are also notaries public are disqualified to act as notaries public if they are employed by office holders who are candidates for re-election in the November 1959 election.

I know of no statute which would disqualify a notary public from exercising his authority as such because of the fact that he is employed by or is the deputy of an office holder who is a candidate for reelection.

SHERIFFS AND SERGEANTS—Deputy City Sergeant Not Employee of State Although it Contributes to Compensation—Medical Expenses in Line of Duty Paid Wholly by City. (24)

MR. ROBERT D. HOLLAND
Assistant City Attorney
City of Norfolk

July 17, 1959

This is in reply to your letter of July 15, 1959, in which you state that Roland V. Murden, Deputy City Sergeant, was injured in line of duty on April 9, 1959, and that the city has paid medical expenses amounting to $31.65 on this account. You further state that the Department of Public Health for the City of Norfolk has filed a claim with the Department of Welfare & Institutions of the State for reimbursement from the city for two-thirds of the medical expenses and that the Department of Welfare & Institutions has refused to pay the claim, stating that it has no authority to approve reimbursement to the City of Norfolk for an expenditure of that nature.

You call attention to Section 65-77 of the Code, which reads as follows:

"Whenever any employee for whose injury or death compensation is payable under this Act shall at the time of the injury be in the joint service of two or more employers subject to this Act, such employers shall contribute to the payment of such compensation in proportion to their wage liability to such employee; provided, however, that nothing in this section shall prevent any reasonable arrangement between such employers for a different distribution as between themselves of the ultimate burden of compensation."

You express the opinion that under this section the State should pay two-thirds of the expenses incurred by the city on account of this injury.
I am of the opinion that there is no liability upon the State in this connection. It is true that under Section 14-91 of the Code the Commonwealth is required to pay two-thirds of the salary and expenses of sergeants and their full time deputies. The expense allowances made by the State Compensation Board do not include items of this nature.

Section 65-77 has reference to the payment of a claim allowed under the Workmen's Compensation Act where an individual has been employed by more than one employer. The Commonwealth of Virginia is in no sense an employer of the sergeant and his deputies of a city. Such officials are the employees of the city, and the State merely contributes to the payment of their compensation.

SHERIFFS AND SERGEANTS—Deputy Sheriff May Not Serve as Member of Town Council. (284)
Public Officers—Compatibility—Deputy Sheriff May Not Serve as Member of Town Council. (284)

March 25, 1960

HONORABLE JOHN H. POWELL
Clerk of Circuit Court of Nansemond County

This will acknowledge your letter of March 23, 1960, which reads as follows:

"I have been asked if a deputy sheriff of the county could be a councilman of one of the towns in Nansemond County."

"I am under the impression from reading the law that he cannot hold both jobs, but I would appreciate your opinion on this question."

In my opinion the provisions of § 15-486 of the Code prevent a deputy sheriff of a county from holding the office of town councilman while serving as a deputy sheriff. This office has previously held that a deputy sheriff is an officer charged with the responsibility of a sheriff. Therefore, the prohibition contained in §15-486 with respect to a sheriff would apply likewise to one of his deputies. This conclusion is strengthened by paragraph (5) of this Code section which makes an exception that allows a deputy sheriff of a county to hold the office of town sergeant of any town within the county. This exception, in my opinion, clearly implies that a deputy sheriff may not hold any other office. Had the legislature intended to permit a deputy sheriff to hold any other office, except that of town sergeant, I think there would be a positive expression to that effect in the statute.

SHERIFFS AND SERGEANTS—Fees for Service of Process—Collection of Town Taxes. (151)

November 12, 1959

HONORABLE J. GORDON BENNETT
Auditor of Public Accounts

This is in reply to your letter of November 9, 1959, in which you request my opinion with respect to the following question presented to you by the clerk of the county court of Charlotte County:

"The Town of Charlotte Court House has come to us to have civil
warrants issued for the collection of personal property taxes and capitation taxes.

"I would like to know whether your letter of September 23, 1959, and the opinion of Attorney General A. S. Harrison applies to these cases. The last sentence of said opinion states: 'If the suit is for local taxes, the deposit of $3.00 is required but not until after process has been served.' The sheriff serving our process does not receive any part of his salary from the Town of Charlotte Court House, and if I am to collect a deposit, should it be $3.75 rather than $3.00?"

Section 14-133 of the Code pertaining to fees in civil cases in county and municipal courts does not require the judge or the clerk of the county court to collect the sheriff's fee. The pertinent provision of the statute is as follows:

"The foregoing court fee shall not include the service fee of any sheriff, city sergeant, or other officer serving process, but the person issuing process shall accept and forward any such service fee when tendered at the time of issuing process."

Whenever at the time of the issuance of process the plaintiff tenders to the county court the officer’s service fee the court is required to accept the money. The court will deliver the process to the officer and pay the officer's fee to the proper treasurer as provided by Section 18-82 of the Code. If, however, the plaintiff does not tender to the court the officer's service fee, the court may deliver the process to the plaintiff and he in turn will deliver it to the officer for service. There is no duty upon the officer to serve a civil process without payment of the statutory fee unless, of course, he is not entitled to a fee by reason of the provisions of Section 14-82 or 14-98 of the Code. These two sections do not apply to suits for town taxes and the officers would be entitled to their usual fee for service of such processes.

SHERIFFS AND SERGEANTS—Service of Process—Subpoenas for Witnesses.

(174) December 7, 1959

Mr. M. C. Lowry, III
Deputy City Sergeant, City of Richmond

This is in reply to your letter of November 30, 1959, in which you state that when you attempted to serve summonses (subpoenas) on two employees of an agency of the Commonwealth, they "were advised to refuse to accept" the processes for the reason that "their mileage and expense fee was not served at the time of this attempted service." You add that the individual who so advised these gentlemen "is of the opinion that these papers can be refused if not accompanied by the fees if their appearance in court is outside of a one hundred mile radius." You ask my opinion of the matter.

As you know, any person refusing to obey the mandate of a summons to appear as a witness before a court of this Commonwealth is subject to a fine not exceeding twenty dollars and an attachment may be issued to compel his attendance. Section 8-302, Code of Virginia. If he attends the court and refuses to be sworn or to give evidence, he may be committed to jail for a period not to exceed twelve months, or until he does give the evidence sought. Section 8-303, Code.

When a person who has been served with a summons and has failed to appear is brought before the court pursuant to § 8-302, however, he may defend by asserting that although "it was required by endorsement on the process," the
allowance for one day's attendance and his mileage and tolls were not paid to him "a reasonable time before he was required to attend." In order to subject him to the sanction of § 8-302, the converse must necessarily be proved. If there is no "endorsement on the process," a person summoned must appear before the court and cannot refuse or fail so to do with impunity.

When you serve a summons on the person named therein and that person makes demand for his one day's attendance, mileage and tolls, you should so indicate on your return of service. The clerk or other officer issuing the process will then notify the party who caused the summons to be issued. Then, if the fees are not paid a reasonable time before he is required to attend, the person served with the summons cannot be held for his failure to attend.

Section 19-236 of the Code provides that:

"Sections 8-294 and 8-296, inclusive, shall apply to a criminal as well as a civil case in all respects, except that a witness in a criminal case shall be obliged to attend, and may be proceeded against for failing so to do, although there may not previously have been any payment, or tender to him of anything, for attendance, mileage, or tolls."

It is clear that even if a person served with a summons in a criminal case makes demand for attendance fee, mileage and tolls and the serving officer endorses the same on the process, the person served must attend whether or not the fees, etc., are paid.

SHERIFFS AND SERGEANTS—Tax Summons—Service is Duty of. (157)

November 18, 1959

HONORABLE FERDINAND F. CHANDLER
Commonwealth's Attorney for Westmoreland County

This is in reply to your letter of November 17, 1959, which reads, in part, as follows:

"Will you please give me your opinion as to whether it is the duty of the Sheriff of the County to serve the summons provided for under Section 58-860 of the Code of Virginia.

..."

"The Commissioner of Revenue has recently handed to the Sheriff quite a large number of these summons to serve, and the sheriff has questioned whether such service was one of his duties."

Section 58-860 to which you refer, provides that if any taxpayer in violation of law shall fail or refuse to file a return of property or income with the commissioner of the revenue within the time prescribed by law*, the commissioner of the revenue may, in the year of such delinquency, summon such taxpayer by registered letter or otherwise to appear before him at his office at the time specified in such summons and to answer, under oath, questions touching such taxpayer's liability*. A summons is one form of process although in this instance it is not a writ issued by a court. It is, however, a statutory notice and in this instance any taxpayer failing or refusing to comply with such summons without good cause or failing or refusing to answer, under oath, questions touching his tax liability shall be subject to a fine within the limits prescribed by this Code section. Under Section 58-867 the commissioner of the revenue is given the power to summon before him fiduciaries, and other designated parties and in this section
no particular method of serving such a summons is prescribed. Under both statutes, in my opinion, the summons is comparable to a statutory notice which is likewise in the nature of a process, and it is the duty of the sheriff or other proper officer to serve such notices.

Section 58-860 to which you refer, you will note, authorizes the commissioner of the revenue to summon such taxpayer by registered letter or otherwise. In my opinion, the word "otherwise" must be construed to mean that the commissioner of the revenue may summon such person in the same manner as any legal notice or process is served.

It is my opinion, therefore, that the service of a summons of this nature comes within the scope of the duties connected with the office of sheriff, and he should serve any such summons in the same manner as he would serve a notice under Section 8-51 of the Code.

SLOT MACHINES—Must be Destroyed—No Authority in Courts to Sell Machines to Satisfy Tax Lien. (376)  

June 8, 1960

HONORABLE WILLIAM H. LOGAN  
Commonwealth's Attorney for Shenandoah County

This is in reply to your letter of June 2, which reads as follows:

"Recently several persons were convicted in the County Court of Shenandoah County for the possession of slot machines in violation of Title 18, Section 290 of the Code of Virginia. The owner of the machines was also convicted of violating Title 18, Section 291. Between the date that the machines were seized and the date of the conviction, and while the machines were in the custody of the Sheriff of this County, the Treasurer of Shenandoah County levied a tax lien on the machines for unpaid personal property taxes due from the owner of the machines. The tax had been assessed on a number of slot machines belonging to the owner and was unpaid and therefore delinquent.

"I am inquiring of you as to whether or not the machines must be destroyed in accordance with Title 18 Section 294, or whether the Treasurer could have the property sold to satisfy the tax lien which is some Six Hundred Dollars ($600.00) or more as I understand. It would seem to me from an economic standpoint that the County should, if at all possible, be able to collect the delinquent taxes. For your information the Court has not yet entered an Order directing the seized property to be destroyed awaiting an opinion from you as to whether or not the tax lien would take precedence. I shall gratefully appreciate your opinion in this connection."

In my opinion upon the conviction of the owner of the machines for a violation of Section 18-291 of the Code, title to the machines ceased to be in the owner. Thereafter the property is no longer subject to sale under a tax lien, even though the lien was perfected prior to the owner's conviction.

It is my opinion that upon conviction of the owner it is mandatory that the machines be destroyed pursuant to the provisions of Section 18-294, which is as follows:

"Any article or apparatus possessed, maintained, kept or used in violation of the provisions of § 18-291 is hereby declared to be a public
nuisance and may, together with all money and tokens therein, be seized under a search warrant issued in accordance with law. Any money so seized shall be forfeited to the Commonwealth and such article or apparatus shall be destroyed."

The statute with respect to the destruction of the articles seized when there has been a violation of Section 18-291, in my opinion, is a mandate that cannot be ignored.

SOIL CONSERVATION DISTRICTS—Actions Against—Jurisdiction. (149)

HONORABLE FELIX E. EDMUNDS
Member, House of Delegates

November 10, 1959

This is in reply to your letter of November 9, 1959, which reads as follows:

"I will appreciate your valuable opinion in connection with the following:

"Plaintiff, owner of an undisputed right-of-way in Augusta County, Virginia, which is being violated by the Shenandoah Valley Soil Conservation District, has filed a bill in chancery in the Circuit Court of Augusta County, Virginia, for a declaratory judgment against the said District and an adjacent landowner, who resides in Fairfax County, and who purchased his land with constructive notice that it may be subject to an alternate right-of-way and such other easements, rights-of-way, etc., as may be necessary, useful, or convenient for the District to have the full enjoyment of its easement for a flood control dam.

"Assuming that said proceeding is a civil suit, rather than one in tort, do Sections 8-38, 8-40 and 8-752 of the 1950 Code of Virginia give exclusive jurisdiction of this proceeding to the Circuit Court of the City of Richmond, in spite of the facts that the adjacent landowner is a necessary party and that the land lies in Augusta County, Virginia?"

Soil conservation districts created under Chapter 1 of Title 21 of the Code are governmental subdivisions of the State and public bodies corporate and politic. Sections 21-28 and 21-53 of the Code. Such political subdivisions, in my opinion, with respect to the power to sue and be sued may be considered in a position similar to counties and municipal corporations. Sections 8-38(9), 8-40 and 8-752 relate to actions against the State and public corporations of which the Commonwealth is the sole owner.

I am, therefore, of the opinion that the Circuit Court of Richmond does not have jurisdiction in a case of this nature.

You, as a member of the General Assembly, are entitled to an opinion from this office on any question, but where the question pertains to pending litigation, it has been our custom to request that our views be withheld from the court, unless, of course, the court requests the same.

STATE, COUNTY AND MUNICIPAL EMPLOYEES—Retention of Position—Entitlement to Reemployment Upon Completion of "War Service" (27)

HONORABLE WILLIAM J. HASAN
Commonwealth's Attorney for Arlington County

July 20, 1959

This is in reply to your letter of July 10, 1959, in which you state:
"An Arlington County police officer voluntarily resigned from the Arlington County Police Force in 1956 to enter the military service of the United States. His term of military service has expired or is now expiring, and the former officer desires to return to his former position with the Arlington County Police Department. The question has been raised as to the applicability of Section 2-27.1 of the Code of Virginia, where an employee voluntarily enters military service in time of peace.

"You will note that the above Code section refers to an officer or employee who voluntarily or otherwise enters the war service of the United States, etc., and the question arises as to whether or not one who voluntarily entered the United States military service in 1956 which was 'in time of peace' would thereby come within the purview of the above Code section."

Section 2-27.1 of the Code of Virginia reads as follows:

"No State, county or municipal officer or employee shall forfeit his title to office or position or vacate the same by reason of engaging in the war service of the United States; and any such officer or employee who voluntarily or otherwise enters such war service may notify the officer or body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office or position during the period of his war service; and the officer or body authorized to fill vacancies shall designate some suitable person to perform the duties of such office as acting officer during the period the regular officer is engaged in war service, and during such period the acting officer shall be vested with all the powers, authority, rights and duties of the regular officer for whom he is acting." (Italics supplied)

I am constrained to believe that the repeated use in this section of the phrase "war service" indicates that the General Assembly intended that the exception be applicable only where a county or other officer or employee entered the armed services in time of war or of extreme military emergency. This country was not at war with any other nation in 1956, nor did any military emergency exist.

In short, I am of the opinion that the phrase "war service" is not synonymous with general military service and has the effect of narrowing the scope of the exception expressed in § 2-27.1. It follows that a county employee who voluntarily resigns from the police force in 1956 to enter the military service has vacated the position he was then occupying and may not now, in 1959, call on the county to restore to him the job he held prior to his entry on active duty with the armed forces of the United States.

STATE EMPLOYEES—Governor’s Executive Assistant is—Covered by Workmen’s Compensation Act. (128)

HONORABLE SHEPPARD CRUMP
The Adjutant General

This is in reply to your letter of October 15, 1959, which reads as follows:

"It is requested that you give me your opinion as to whether or not Mr. Peyton B. Winfree, Jr., Executive Assistant to the Governor, and Mr. Wilbur Walker, Administrative Assistant to the Governor, may be
REPORT OF THE ATTORNEY GENERAL

considered beneficiaries under the Workman's Compensation Law. My interest in this arises from the fact that from time to time these gentlemen make use of air transportation furnished by the Air National Guard and the premium for the insurance thereon depends on their status under the Workman's Compensation Law."

In my opinion these two positions are covered by the Workmen's Compensation Act—Title 65 of the Code of Virginia.
Section 65-4 of the Code, which defines the term "employee" as it relates to the State, reads in part as follows:

"… and as relating to those so employed by the State the term 'employee' includes the officers and members of the National Guard, the Virginia State Guard and the Virginia Reserve Militia, registered members on duty or in training of the United States Civil Defense Corps of this State, the forest wardens, and all other officers and employees of the State, except only such as are elected by the people or by the General Assembly, or appointed by the Governor, either with or without the confirmation of the Senate, provided that this exception shall not apply to any 'State employee' as defined in paragraph (5) of § 51-111.10 nor to members of the Industrial Commission and the State Corporation Commission, nor to the Superintendent of State Police; … ."

By reference to paragraph (5) of Section 51-111.10 of the Code, it will be noted that these two positions come within the definition of "State employee" and are not contained in the exception thereto.

Therefore, although these positions are filled by appointment by the Governor, they are not positions to which the exception in Section 65-4 applies.

STATE EMPLOYEES—Wages—Assignment of—Delivery of Check to Credit Union Pursuant to Power of Attorney (274)

March 9, 1960

HONORABLE THEODORE G. DENTON
Superintendent, Central State Hospital

This is in response to your letter of February 26, 1960, in which you make reference to my opinion of February 9, 1960, addressed to Honorable Alfred E. H. Ruth, Director of Mental Hospitals. In that opinion I stated that: "… the assignment by an employee of the Department of Mental Hygiene and Hospitals of his wages, which assignment is not made in conformity with § 34-29, is void and that the Department may not withhold such wages from the salary of an employee."

You make reference to the Credit Union at Central State Hospital, and state in part as follows:

"… The procedure which is now proposed is that an employee obtaining a loan from the Credit Union will sign a power of attorney, authorizing a duly appointed and designated member of the Credit Union to receive the employee's pay check from the hospital pay master at the time, place, and in such manner as said check would usually be received by the employee in question. This power of attorney does not authorize the Credit Union to endorse, cash, attach or impound this pay check without the cooperation and approval of the employee. The hospital would not be involved in any manner outside of simply trans-
mitting the pay check to the person legally authorized to receive it by the power of attorney, and thus would have nothing to do with the actual disposition or allocation of the monies involved. Personally, I can see no objection to such a procedure but would appreciate your opinion concerning it, " * * ."

Since receiving your letter of March 3, 1960, I have discussed this matter by telephone, and you advise me that the mechanics involved are as follows:

The employee's check is turned over by the Central State Hospital to a representative of the Credit Union. The employee (the payee named on the check) goes to the office of the Credit Union, endorses the check and the Credit Union cashes it from funds available in the office. The employee then pays to the Credit Union an amount previously agreed upon. If there are insufficient funds in the office of the Credit Union to cash the check, a representative thereof accompanies the employee to a bank where the check is cashed. The employee then makes his payment to the Credit Union. The Credit Union is not authorized by the power of attorney to endorse the check in behalf of the within named payee.

This is apparently an arrangement by which the Credit Union is authorized to receive the check and requires that the employee appear to cash it. The employee could, of course, demand his check from the Credit Union at any time by revoking the power of attorney. I am of the opinion that the procedure set forth in your letter, and amplified by you in our telephone conversation, is not, in fact, in violation of §34-29 of the Code for the reason that it is not an "* * * assignment, sale, pledge or mortgage of the wages or salary of a laboring man * * *." This is manifest for the reason that the Credit Union is not authorized to endorse and cash the employee's check and withhold a portion of the employee's wages. This latter arrangement would be permissible only if it were within the limits specified in §34-29 of the Code.

STATE EMPLOYEES—Workmen's Compensation Act—Subrogation—Commonwealth May Not Recover Sick Leave Pay From Third Party or Employee Under Act. (275)

March 7, 1960

HONORABLE JOHN W. GARBER
Director of Personnel, Commonwealth of Virginia

This is in reply to your recent inquiry as follows:

"Does the Commonwealth have the right of subrogation to recoup compensation paid to an employee under Rule 10.4(c) of the Rules for the Administration of the Virginia Personnel Act?"

You state a case in which an employee of the State sustained a serious injury in an automobile accident while on official State business. The employee was absent from duty thereafter for some two months and was able to work only part time for the next month and twenty days. The State agency by which he was employed paid a total of $818.00 for medical services rendered to the employee and compensation in the amount of $1183.75 during the period of his absence from duty. Of this compensation, $372.27 represents an award by the Industrial Com-
mission and the balance represents the difference between such award and the employee's regular salary. You add that the employee has now retained counsel and instituted suit against the third party allegedly responsible for his injury.

As you state, Rule 10.4(c) prescribes that an employee incapacitated by injury, as defined by the Workmen's Compensation Act, is entitled to the benefits provided by that Act and the Rule further provides that "sick leave with pay shall be provided in such instances * * * without charge against the employee's leave balances." The Rule goes on to prescribe that the compensation to be allowed such employee shall be the difference between the compensation allowed under the Workmen's Compensation Act and the full salary otherwise payable.

Section 65-39 of the Code of Virginia requires the court trying an action brought by an employee against a third party to "ascertain the amount of compensation paid and expenses for medical, surgical and hospital attention and supplies, and funeral expenses, incurred by the employer under the provisions of this Act," and, in the event of judgment against the third party, the court shall require the judgment debtor to pay such compensation and expenses of the employer as ascertainable to the employer and the balance to the judgment creditor.

Section 65-69 of the Code provides that any payments made by the employer to the injured employee during the period of his disability, or to his dependents, "which by the terms of this Act were not due and payable when made," may be deducted from the amount to be paid as compensation, subject to the approval of the Industrial Commission. This latter section, when read together with § 65-38, giving to the employer the right of subrogation to the extent of the amount of "compensation," and with § 65-39, indicates that the employer is not entitled to be subrogated against the third party for any sums constituting sick leave pay paid to employee during the period of his absence from work. In other words, since sick leave pay is not included in the provisions of the Workmen's Compensation Act, it is considered as a form of gratuitous payment by the employer and is not recoverable from the third party or the employee. The State is limited to recovery of the amount of medical expenses paid and the amount of the award of the Industrial Commission to the employee. I am returning the letter you forwarded.

STATE HOSPITAL BOARD—Surplus Property—Manner in Which Board May Lease. (333)

HONORABLE A. E. H. RUTHERFORD
Director, Department of Mental Hygiene and Hospitals

This is in reply to your letter of May 2, which reads as follows:

"At the last session of the General Assembly, a bill was passed (S.B. 105) amending Section 37-34:2:5 authorizing the State Hospital Board to lease surplus property.

"Apropos of this legislation, your opinion is respectfully requested upon the following questions:

"1. May the Hospital Board negotiate a lease upon such terms as it may deem appropriate?

"2. May the Board lease such property at the monthly rental rates presently established by the Director of the Budget for State employees when occupying such property—or—

"3. Must the Board follow the same procedure for leasing surplus property as is prescribed in Section 37-34:2:2 through Section 37-34:2:6 for the sale of such property?"
I find that Senate Bill No. 105 amended § 37-34.2:6 instead of § 37-34.2:5. I understand that no bill was introduced affecting the latter section. The amendment to § 37-34.2:6 adds the following language:

"In lieu of sale of any such property, the Board may, with the approval of the Governor, lease the same to any responsible person, firm or corporation on such terms as shall be fair and adequate in relation to the value of such property. The provisions of this article requiring that disposition of such property shall be through the medium of sealed bids or public auction shall not apply to any lease thereof. The provisions of §§ 37-34.2:1 through 37-34.2:4 shall apply mutatis mutandis to any proposed lease of any such property. The deed of lease to such property shall be in a form approved by the Attorney General and shall be executed by the State Hospital Board. The terms of any such lease shall be subject to the approval of the Governor in writing."

I have not seen this senate bill as signed by the Governor, but I am advised that no amendments were made and that the Act is in the same language as is contained in the bill. With respect to question 1, in my opinion, the Board has the discretionary power to determine the terms of the lease. The Board is the judge as to whether such terms are "fair and adequate in relation to the value" of the property being leased. Of course, any such lease must be approved by the Governor.

The amendment specifically prescribes that the provisions of §§ 37-34.2:1 through 37-34.2:4 shall apply mutatis mutandis to any proposed lease of any such property. Therefore, before any property may be leased under this amendment, the steps set forth in these four provisions must be taken.

The provisions of § 3-34.2:5 requiring sealed bids or sale at public auction are expressly excluded by the amendment. The leases, therefore, may be made by negotiation without regard to the provisions of § 37-34.2:5.

STATUTES—Police Power—Proposed Statute Prescribing Compulsory Polio Vaccination of Children Attending Public Schools Not in Violation of Constitutions. (22)

HONORABLE TOM FROST
Member House of Delegates

July 17, 1959

I am in receipt of your letter of July 9, 1959, in which you state that you have been requested by citizens of Rappahannock County "to present a bill in the coming session of our legislature which would require children attending public schools to be vaccinated with the Salk Vaccine against polio". You request to be advised whether or not such a bill, if enacted into law, would be constitutional.

State laws providing for the compulsory vaccination of individuals in the interest of public health and safety have generally been held to constitute a valid exercise of the police power of the various states. A leading case upon this subject is Jacobson v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643, in which the Supreme Court of the United States held that a statute of the type under consideration was not antagonistic to the Fourteenth Amendment to the Constitution of the United States. In general, the Court pointed out in that case that the authority of the State to enact such a statute was referable to the State's police power, that such power embraced at least such reasonable regulations established directly by legislative enactment as will protect the public health and the public
safety, and that, in view of the nature of the disease against which the remedy was
directed and the effectiveness of vaccination in eradicating it, the statute was not
arbitrary, unreasonable or oppressive and did not infringe rights secured to
citizens of the United States by the Fourteenth Amendment.

This office has previously had occasion to consider the question of whether or
not Section 22-249 of the Virginia Code, which requires vaccination of teachers
and pupils in the public schools of the Commonwealth was violative of the
various provisions of the State and Federal Constitutions insuring freedom of
religious belief. In this connection, I am forwarding to you an opinion, dated
March 8, 1950, rendered to the Honorable Howard W. Smith, Jr., Common-
wealth's Attorney for the City of Alexandria, by the Honorable J. Lindsay
Almond, Jr., then Attorney General, in which it was ruled that the statute there
under discussion was not in violation of "either the federal or State Constitu-
tions".

I am constrained to believe that the considerations supporting the decision
of the United States Supreme Court in the Jacobson case, supra, and the various deci-
sions cited in the above mentioned opinion would also be applicable to a statute
of the type concerning which you inquire. Although the utilization of the Salk
Vaccine as a deterrent of poliomyelitis is of relatively recent origin, as compared
to the use of vaccination as a preventative of smallpox, I understand it to be the
consensus of informed medical opinion that the Salk Vaccine is highly effective in
reducing the ravages of poliomyelitis, without posing a serious risk to the general
health of those who are vaccinated. I am, therefore, of the opinion that the bill
you contemplate, if enacted into law, would constitute a valid exercise of the police
power of the State, and would not impermissibly infringe rights secured by the
Constitutions of the United States or the Commonwealth.

SUNDAY—Sales—Unlawful to Sell Pets. (392)

HONORABLE JOHN H. TEMPLE
Member of Senate

I am in receipt of your letter of June 15, 1960, in which you inquire whether or
not—in light of the recent amendments to the Sunday Closing Law—proprietors of
a pet shop may legally sell, on Sunday, dogs and cats which have been bred and
raised by the proprietors and not purchased by them for resale. Chapter 267,
Acts of Assembly (1960); Section 18-329 et seq., Code of Virginia (1950) as
amended.

In this connection, Section 18-329, as recently amended, provides in part:

"On the first day of the week, commonly known and designated as
Sunday, it shall be unlawful for any person to engage in work, labor or
business or to employ others to engage in work, labor or business except
in household or other work of necessity or charity. The exemption for
works of necessity or charity contained in the preceding sentence shall
not be deemed to include selling at retail or wholesale or by auction; or
offering or attempting to sell, on Sunday, any of the following: * * pets,
pet equipment or supplies; cameras and photographic supplies (exclud-
ing film and flash bulbs); * *" (Italics supplied).

In light of the language quoted above, it is manifest that the amended statute
forbids the sale of pets as well as pet equipment and supplies, and the statute
includes no exemption permitting the sale of pets which are bred and raised by
the seller.
TAXATION—Area of Exclusive Federal Jurisdiction—Powers of County to Assess. (217)

HONORABLE GEORGE D. FISCHER
Commissioner of the Revenue of Arlington County

Please accept my apologies for the delay in replying to your letter of December 31, 1959. The press of work in this office and the necessity of devoting considerable time to research into the questions presented by you have prevented my answering prior to this time.

Your letter states:

"I enclose, herewith, a copy of a deed from Colgate W. Darden, Governor of Virginia, to the United States which is recorded under date of June 22, 1945, in the land records of Arlington County, in Deed Book 674, Page 84. The legal description of the property has been omitted as having no material value respecting the two questions upon which I ask your opinion. The Pentagon Building is located upon land situated within the geographical borders of Arlington County. From the language used in the instrument, enclosed, and in view of the decision in the case of the City of Detroit v. The Murray Corporation of America, 355 U. S. 489, 78 S. Ct. 458, I respectfully, request your opinion on the following two questions:

"Question #1—Do I, as Commissioner of the Revenue for Arlington County, Virginia, have the authority to assess for local tangible personal property taxation, tangible personal property located in the Pentagon Building belonging to individuals, firms and corporations, other than Public Service Corporations, which tangible personal property is leased to the United States Government and used by it?

"Example—International Business Machines Corporation owns electronic equipment located in the Pentagon and leases such equipment to the United States Government.

"Question #2—Do I, as Commissioner of the Revenue for Arlington County, Virginia, have the authority to assess a tangible personal property tax against individuals, firms and corporations, other than Public Service Corporations, based upon the fair market value of tangible personal property belonging to the United States Government but furnished to such individuals, firms and corporations for their own private enterprizes?

"Example—The Knott Catering Corporation under contract with the United States Government operates the restaurants and snack bars in the Pentagon Building using equipment owned by the United States Government in the performance of the contract."

With regard to your first question, since the United States has been ceded exclusive jurisdiction over the military reservation officially designated as "The Pentagon," this area is considered a "Federal island" within the boundaries of the Commonwealth of Virginia. Unless the terms of the deed of cession or some Federal legislation permit the Commonwealth or its subdivisions to tax tangible personal property located therein, no such power remains in either the State or the county within the geographical boundaries of which the federal area lies.

You will note that the deed of cession, dated May 18, 1945, pursuant to which jurisdiction was accepted on June 5, 1945, provides in part:

"In the event that the said lands or any part thereof shall be sold or leased, to any private individual, or any association or corporation,
under the terms of which sale or lease the vendee or lessee shall have the right to conduct thereon any private industry or business, within the jurisdiction ceded to the United States over any such land so sold or leased shall cease and determine, and thereafter the Commonwealth of Virginia shall have all jurisdiction and power she would have had if no jurisdiction or power had been ceded to the United States. This provision, however, shall not apply to post exchanges, officers' clubs, and similar activities on said lands."

It appears, therefore, that part of the answer to your question will depend on whether any individual firm or corporation is lessee of any portion of the "military reservation officially designated The Pentagon." From the example you give, in which you state that International Business Machines Corporation owns certain equipment located in the Pentagon and leases the same to the Federal government, I do not believe that this property is taxable by the County, since it is situated on a military reservation over which the Federal government has exclusive jurisdiction and which, for the purpose of taxation of tangible personal property, is not in Virginia within the purview of § 58-834 of the Code of Virginia.

The Buck Act, codified as 4 U.S.C.A. §§ 104, et seq, specifically waives the Federal jurisdictional exemption to the extent that it permits the assessment of State taxes on motor fuels, sales or use taxes, and income taxes on income from transactions occurring or services performed in such Federal areas. The Act, in § 107, expressly exempts the United States or any instrumentality thereof from the imposition of either a sales or use tax or an income tax. It follows that the tangible personal property tax assessed by Arlington County, being a tax assessed at the fair market value of the property (Constitution of Virginia, Section 169) is an ad valorem property tax and not a sales, use or income tax.

In stating your second question and in giving the example which follows, you did not advise whether the Knott Catering Corporation leases those portions of the real estate in which it operates the restaurant and snack bars you mentioned. In any event, however, I do not believe that consideration of this aspect of the situation is necessary, since the equipment is owned by the United States and our Virginia statutes, in particular §§ 58-20 and 58-837, limit liability for this tax to the taxpayer owning the personal property. In the Detroit v. Murray case which you mentioned in your letter, the Michigan statute imposed taxes on: "The owners or persons in possession," while our Virginia statutes do not contain any reference to "persons in possession." For this reason, I do not feel the Murray case to be applicable to the extent that we could rely upon it to sustain an assessment of a tangible personal property tax on such property owned by the United States, even if such property is furnished to a firm or corporation for use in its own private enterprise, since without a Federal statute waiving immunity, property owned by the United States government is immune from State or local taxation.

TAXATION—Capitation Tax—Assessable by County of Domicile Not by County of Temporary Residence—County Treasurer Authorized Only to Collect Tax. (78)

September 3, 1959

Honorable W. D. Reams, Jr.
Assistant Commonwealth's Attorney for Culpeper County

This is in response to your letter of August 19, 1959, which reads as follows:
"H and W, neither of whom has ever paid the State Capitation tax nor registered to vote in Culpeper County, applied to the Commissioner of Revenue to be assessed.

"Both had previously lived in Culpeper County and continue to work here. Eighteen months ago they were married and moved into and furnished a house owned by H's father across the county line in Rappahannock County. Each day they come into Culpeper to work and each night return to Rappahannock to spend the night. They both claim Culpeper as home and desire to pay capitation taxes and vote in Culpeper County.

"On the basis of this information, the Commissioner determined that they were taxable in Culpeper County and assessed them. He then sent the record of assessment to the Treasurer of Culpeper County.

"The Treasurer personally knew of the fact that H and W lived in a house in Rappahannock County. He went to the Commissioner and asked for a delay in the collection of the tax, in order to determine domicile.

"The Treasurer then came to this office and reported the matter. He was advised to return the assessment as erroneous, which he did.

"This office respectfully requests your opinion as to:

(1) The county in which H and W are assessable

(2) The duty of the Commissioner relative to the assessment after a request to defer the matter by one other than the taxpayer

(3) The duty of the Treasurer after the assessment is forwarded to his office knowing the above facts."

The question of the proper county in which the capitation tax is to be assessed must be determined by the facts in each particular case. The Commissioner of the Revenue of the county or city is the assessing officer. If the two persons in question (H and W) are domiciliaries of Culpeper County and are temporarily residing in Rappahannock County and intend to return to Culpeper County, then I am of the opinion that they are assessable with the capitation tax in the County of Culpeper.

After such assessment is made by the Commissioner of Revenue it can only be attacked in the courts in the manner provided by law.

The duty of the Treasurer of the County is to collect the capitation tax and he is not empowered to hold an assessment made by the Commissioner of the Revenue erroneous.

Your attention is directed to the fact that the payment of the State capitation taxes does not itself entitle any person to register to vote. The payment of such tax is a prerequisite for registration, but a person registering to vote must satisfy the Registrar with respect to his or her place of residence for voting purposes. The situs of a person's residence for voting purposes in many instances depends upon the intent of such person.

TAXATION—Collection of Delinquent Real Estate Taxes—Suit Instituted in County and Process Executed Elsewhere. (97) September 21, 1959

HONORABLE E. C. WESTERMAN, JR.
Commonwealth's Attorney for the County of Botetourt

I am in receipt of your letter of September 16, 1959, in which you present the following situation and inquiry:

"Please assume that a person owns a farm in Botetourt County, but
he resides in the City of Roanoke. He lets his taxes on his Botetourt County farm go delinquent and the Botetourt County Treasurer desires to collect these taxes by a personal action.

"My question is this: May the County Treasurer of Botetourt County sue the owner in the County Court of Botetourt County and have process served on the owner by the City Sergeant in the City of Roanoke? This is a question of sending process out of the County where the action is brought.

"I refer you to Section 58-1015 and Section 8-47 of the 1950 Code of Virginia. Does Section 8-47 prohibit execution of process in Roanoke City where suit is brought in the County Court of Botetourt County in this tax matter?"

Section 58-1014 of the Virginia Code provides that the payment of any taxes, State, county or municipal, may, in addition to the remedies now allowed by law, be enforced by warrant, motion for judgment at law, bill in chancery or by attachment before a trial justice or a court of record within this State in the same manner and to the same extent as now exists or may hereafter be provided by law for the enforcement of demands between individuals. Section 58-1015 of the Code prescribes that the proceedings authorized by Section 58-1014:

"shall be instituted in the appropriate court of the county or city wherein the taxes in question were assessed or payable or wherein the person against whom they were assessed resides or resided at the time such taxes were assessable."

Section 8-47 of the Virginia Code provides:

"Process against the defendant to answer in any action, suit, or motion brought under Section 8-39, shall not be executed in any other county or city than that wherein the action, suit or motion is brought, unless it be:

"(1) An action against a corporation;

"(2) An action upon a bond by an officer under authority of some statute;

"(3) An action to recover damages for a wrong; or

"(4) An action against two or more defendants on one of whom such process has been executed in the county or city in which the action is brought;

"Or unless it be otherwise specially provided." (Italics supplied)

In light of the language italicized in the statute quoted immediately above, I think it is manifest that the limitation against the execution of process against a defendant in a county or city other than that wherein an action, suit or motion is brought is confined to those instances in which the action, suit or motion is brought under Section 8-39 of the Virginia Code, which statute prescribes that an action or suit may be brought in any county or city wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein. When the venue of an action or suit is based upon Section 8-39, the execution of process outside the city or county of the venue is expressly forbidden by Section 8-47, except in those instances specifically enumerated therein. See, Commonwealth v. Hall, 194 Va. 914, 918. However, I do not believe that this limitation applies when the venue of an action or suit is based upon some statute other than Section 8-39.

In the situation concerning which you inquire, it would appear that the venue of the contemplated action for the collection of taxes would be predicated
upon the provisions of Section 58-1015 of the Virginia Code, which expressly states where the proceedings authorized by Section 58-1014 shall be instigated. I am of the opinion that an action predicated upon the provisions of Section 58-1015 would not be affected by the provisions of Section 8-47 of the Virginia Code and that the latter statute would not prohibit the execution of process in the City of Roanoke of a suit brought for the collection of taxes in the County Court of Botetourt County.

Notwithstanding the view just expressed with respect to the operation of Section 8-47 of the Virginia Code, I call your attention to Section 16.1-76 of the Virginia Code which relates to venue and service of process in civil actions within the jurisdiction of courts not of record and prescribes:

"The provisions of Section 8-38 prescribing in what counties and cities actions at law may be brought in courts of record shall apply to civil actions brought in courts not of record when such actions are within the jurisdiction of the latter courts. In addition to such venue, any civil action within the jurisdiction of a court not of record may be brought in any county or city wherein the defendant, or one or more of them if there be more than one defendant, is regularly employed or has his regular place of business, or in which the cause of action or any part thereof arose, although neither the defendant nor any one of the defendants reside therein; and any warrant or process against any such defendant may be directed to a sheriff or sergeant of any other county or city wherein the defendant resides or may be found; but no such warrant or other process shall be served or executed in any other county or city than that wherein the action is brought unless it be:

"(1) An action against a corporation;
"(2) An action upon a bond taken by an officer under authority of some statute;
"(3) An action to recover damages for a wrong;
"(4) An action against two or more defendants on one of whom such warrant or process has been executed in the county or city in which the action is brought; or
"(5) Unless it be otherwise specially provided."

I am constrained to believe that, under a proper interpretation of the above quoted statute, the limitation upon the execution of process enunciated therein is confined to those instances in which the venue of an action is predicated upon the particular circumstances specified in the second sentence thereof, and that such limitation would not be applicable to the instant situation in which venue would be predicated upon the provisions of Section 58-1015 of the Virginia Code. However, this construction of the statute in question is not entirely free from doubt, and you may deem it advisable to institute the contemplated action for collection of taxes in the appropriate court not of record in the city of Roanoke where the defendant resides.

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TAXATION—Collection—State and Local Taxes—Deposit of Fee for Warrant. (88)

September 16, 1959

HONORABLE G. HUGH TURNER
Treasurer of Franklin County

This is in reply to your letter of August 28, 1959, which reads as follows:
"I would like to have a ruling of your opinion in regard to Chapter 555, Acts of General Assembly, approved March 29, 1958, in regard to issuing of distress warrants for taxes, County and State.

"I would like to have your opinion on whether or not I as the Treasurer of Franklin County should pay the cost of the warrant at the time of issuing of the warrant to the County Court for State Income and also County taxes.

"Here before we have not been paying any cost to the court until the collection of taxes and cost of warrants and Sheriff's fees have been collected.

"I would appreciate very much your advising me in what steps to use in issuing distress warrants to comply with the law. If we are to pay to the court cost of the warrant before hand, then we should ask the Supervisors for an appropriation of this money."

Section 14-133 of the Code provides for a fee of $3.00 in civil cases in county and municipal courts. The second paragraph of this Code section reads as follows:

"(1) For all court and justice of the peace services in each distress, detinue, interrogatory summons, unlawful detainer, civil warrant, notice of motion, garnishment, attachment issued, or other civil proceeding, $3.00 unless otherwise provided in this section, which shall include the fee prescribed by § 16.1-115.

"The judge or clerk shall collect the foregoing fee at the time of issuing process. Any justice of the peace or other issuing officer shall collect the foregoing fee at the time of issuing process. He may deduct therefrom a justice of the peace (or other issuing officer) fee of $1.25 for his services in the case. He shall remit the remainder promptly to the court to which such process is returnable, or to its clerk. Any sheriff, city sergeant, or other officer serving process shall collect the foregoing court fee before serving any notice of motion of judgment, which fee he shall remit on or before the return day of such motion to the court to which such motion is returnable, or to its clerk, except that no fee shall be collected in tax cases until after process has been served. When no service of process is had as to any defendant served by notice of motion for judgment, the officer serving process shall return such notice of motion and the court fee collected by him to the plaintiff or his counsel. The foregoing court fee shall not include the service fee of any sheriff, city sergeant, or other officer serving process, but the person issuing process shall accept and forward any such service fees when tendered at the time of issuing process. When no service of process is had on a defendant named in any civil process other than a notice of motion for judgment, such process may be re-issued once by the court or clerk at the court's direction by changing the return day of such process, for which service by the court or clerk there shall be no charge."

The italicized language, in my opinion, is applicable to all tax cases whether brought by notice of motion or by the issuance of a warrant by the county court judge or other issuing officer. I reach this conclusion because it will be noted from this section that when process is issued by the county court $3.00 is required to be collected from the plaintiff. When a suit is brought by notice of motion the sheriff to whom the notice of motion is delivered becomes the collecting agent for the county court and is required to collect the $3.00 fee from the plaintiff. Therefore, regardless of the nature of the suit the $3.00 fee is paid into the county court. The italicized language, in my opinion, is not
intended to apply only in a case where the suit is commenced by notice of motion for judgment.

Under Section 14-82 of the Code, sheriffs and sergeants are not entitled to collect a fee for the service of process where the suit is brought on behalf of the county for which such officer is elected or appointed. The fee for these officers, however, is not included in the $3.00 deposit.

Under Section 14-98 of the Code, it is provided as follows:

“No clerk, sheriff, sergeant or other officer shall receive payment out of the State treasury for any services rendered in cases of the Commonwealth, except when it is allowed by this or some other chapter.”

Under this section, if the suit is on behalf of the Commonwealth for State taxes, then no fee is payable out of State funds to the county judge, clerk or sheriff. I do not feel that Section 14-133 constitutes an exception such as is contemplated by the last clause of Section 14-98.

I am of the opinion, therefore, that in any case where a public officer brings a suit for the collection of taxes whether or not it be by process issued by a county court or its clerk or by notice of motion for judgment no deposit should be made by the treasurer in suits for State taxes, either before or after process has been served.

If the suit is for local taxes, the deposit of $3.00 is required but not until after process has been served.

TAXATION—Counties—Board of Supervisors May Fix Different Rate on Farmers' Tangible Personal Property. (315)

HONORABLE C. A. SINCLAIR
Treasurer of Prince William County

This is in reply to your letter of April 15, which reads as follows:

““The Board of Supervisors of Prince William County has advertised as a part of the County budget for the coming year tax rates as follows:

“$4.00—On all real estate and tangible personal property, except farmers' machinery, tools and livestock.
“$3.85 On farmers' machinery, tools and livestock.
“$0.60 On merchants capital.

“Please advise me whether or not the Board of Supervisors has the authority to place farmers' machinery, tools and livestock in a separate classification and to levy a rate of taxation thereon different from the rate of taxation levied on the same kinds of tangible personal property belonging to other individuals, firms or corporations.”

In my opinion the board of supervisors has the authority to fix the rates of levy as indicated. This authority is contained in § 58-851 of the Code. Under Section 168 of the Constitution the General Assembly has the power to define and classify taxable subjects and apply a uniform rate of tax upon the same class of subjects.
TAXATION—Counties—Treasurers—No Authority for County to Levy Capital Outlay Tax Exclusively Upon Property in Towns—County Treasurer Not Authorized to Collect Tax Levied by Towns. (314)

HONORABLE C. H. DAVIDSON, JR.
Commonwealth's Attorney for Lexington

This is in reply to your letter of April 13, in which you state that the county of Rockbridge and the town of Lexington operate a high school which is located within the corporate limits of the town of Lexington and that the pupils who attend this school live both within and outside its corporate limits.

You further state:

"(3) The following information concerns the budget for Rockbridge County Public Schools and Lexington Public Schools for the fiscal year 1960-1961:

"(a) A Uniform levy for all Magisterial Districts in the County, including the Town of Lexington, for school operations has been set at $1.85.
"(b) A levy for capital outlay and Debt Service for the County only (as distinguished from the Town of Lexington) has been set at fifty-five cents.
"(c) That the Town School Board in submitting its budget included for the fiscal year 1960-1961 a new levy for capital outlay for the Town of Lexington only, of forty-five cents. The purpose of this capital outlay levy was to pay for alterations of old school buildings, equipment for buildings and Debt Service on Literary Loans for long term obligations. The Division Superintendent of Schools advised the Board of Supervisors that the Town School Board had included this additional levy for schools in its budget. Of course, the Lexington School Board has had Capital Outlay and Debt Service items in the past in its budgets, but it is my understanding that such items have been paid for by cash appropriations out of the General Fund. The General Fund levy for the Town has always been laid by the Town.

"Miss M. Elizabeth Moore, Treasurer of Rockbridge County has raised the question under these state of facts which political subdivision lays the forty-five cent capital outlay levy for the Town Schools? Miss Moore was advised by the Honorable Gordon Bennett, Auditor of Public Accounts, to seek this information from your office. Miss Moore is advised if the County lays the levy that her office will have to collect it. Naturally, the County Treasurer would like to be relieved of the responsibility of this additional work unless it is required by law. Is it mandatory for Rockbridge County to lay a special capital outlay levy on property solely within the corporate limits of the Town of Lexington for Schools solely within the Town?"

Since receipt of your letter we have talked to you by telephone and it appears that there are two questions involved: (1) whether or not the board of supervisors of the county has authority to lay a levy for capital outlay purposes which will be confined to property located within the corporate limits of the town of Lexington, and (2) if this cannot be done and the town council lays such a levy, will there be any duty upon the treasurer of Rockbridge county to collect the taxes resulting from such special levy.
With respect to question (1), it is clear that the board of supervisors does not have authority to lay a levy that will be confined to property located within the corporate limits of the town of Lexington. In this connection you are referred to Section 168 of the Constitution and the case of Brunswick County v. Peebles, 138 Va. 348, and Woolfolk v. Driver, 186 Va. 174.

There is no duty upon the treasurer of a county to collect taxes imposed by the council of an incorporated town located within said county. It is the duty of the treasurer of the town to collect town taxes. I am not familiar with any statutory provision under which the treasurer of the county would be authorized to collect taxes resulting from a levy imposed by the town council of a town.

TAXATION—Disclosure of Information by Commissioner of Revenue—May Reveal County Total of Merchants' Sales. (105)

HONORABLE FRANK L. MCKINNEY
Commonwealth's Attorney for Halifax County

This is in reply to your letter of September 24, 1959, which reads as follows:

"I am interested in having an interpretation of Section 58-46 of the Tax Code dealing with the subject of secrecy of information. It seems clear as to the giving out of any information as to any individual, corporation or partnership. I have read the opinion of the Attorney General dated December 10, 1951 (Opinions of Attorney General, July 1, 1951 to June 30, 1952).

"My inquiry is this: Does this section prohibit the giving out of information for publication by a County Commissioner of the Revenue when such information consists solely of the totals of such things as merchants' sales within the county for a given year?"

Code Section 58-46, to which you refer, reads as follows:

"It shall be unlawful for any tax or revenue officer or employee to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties. Any violation of the provisions of this section shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or by both; provided, however, that the Governor may at any time, by written order, direct that any information herein referred to shall be made public or be laid before any court; and, provided, further, that this inhibition does not extend to any matters required by law to be entered on any public assessment roll or book, nor to any act performed or words spoken or published in the line of duty under the law."

In my opinion this section does not prohibit the publication of the type of information to which you refer. The purpose of the statute, in my judgment, is to make it unlawful to divulge such information in respect to the income or business of any particular person, firm or corporation. Information relating to the total amount of sales made by all of the retail merchants within a county, unaccompanied by a breakdown of such sales with respect to each individual merchant, would not, in my judgment, be a violation of the statute under consideration.

REPORT OF THE ATTORNEY GENERAL

September 29, 1959
REPORT OF THE ATTORNEY GENERAL 345

TAXATION—Exemption for New Manufacturing Plant—Counties May Not Grant. (77).

HONORABLE A. ERWIN HACKLEY
Commonwealth's Attorney for Page County

This is in reply to your letter of September 2, 1959, which reads as follows:

"As attorney for the Page County Board of Supervisors, I would like to inquire as to whether or not there is any law under which the Board of Supervisors of Page County can exempt a new manufacturing plant from taxation for a period of five years. I am aware of Section 189 of the Constitution and Section 58-17 of the Code. However, Section 58-17 of the Code appears to apply to a special County. The Board of Supervisors is anxious to grant such an exemption in order to induce the new plant to locate here. In 1941, a previous Board of Supervisors passed a resolution exempting the Luray Textile Manufacturing Company from taxation for a period of five years, and in 1942, a similar exemption was granted to the Virginia Oak Tannery for a period of five years. I am anxious to know under what authority this exemption was granted, if any, and we would like to grant a similar exemption in the present situation."

I enclose copy of an opinion relating to this same situation, dated February 26, 1953 (published in Report of Attorney General for 1952-53, at page 29), furnished to the Commonwealth's Attorney of Montgomery County, in which we held that the counties cannot grant the exemption in question. Section 435b of the Tax Code formerly authorized counties to grant such exemptions as an inducement. However, this provision was repealed by Chapter 224 of the Acts of Assembly, 1944.

TAXATION—General Reassessments—Failure to Accomplish Within Statutory Period—Does Not Impair Power of County to Levy. (206)

HONORABLE FRANK L. MCKINNEY
Commonwealth's Attorney of Halifax County

This is in reply to your letter of January 6, 1960, which reads as follows:

"I am concerned about the matter of levying taxes on real estate in this county for 1960. In 1953 there was a general reassessment in which the assistance of the Department of Taxation was utilized. Section 58-784.2 (last amended in 1958) provides, first of all,

"'Notwithstanding the foregoing provisions of this article, the governing body of any county may postpone any general reassessment hereafter for a period not exceeding three years.'"

"Further on in this same section there is the following language:

"'... and that the period between general reassessments shall not exceed six years in any other case.'"
As stated above, there was a general reassessment in this county in 1953 and none since, and the governing body of the county interpreted Section 58-784.2 as authorizing an extension for not exceeding three years, and accordingly deferred a general reassessment which ordinarily would have been made in 1959. The clause quoted authorizing an extension of not exceeding three years appears to be inconsistent with the later clause in the same section saying that the period between general reassessments shall not in any case exceed six years.

"What I should like to know is whether the county has authority to make the general levy of county taxes for the year 1960 when there was no general reassessment in 1959. In other words, would the county have power to make any levy of county taxes for 1960 when there has not been a general reassessment? Does the first sentence in Section 58-784.2 have any meaning or efficacy? Of course, there are no annexation proceedings involved in this county."

This office has previously taken the position, which has been concurred in by Honorable C. H. Morrissett, State Tax Commissioner, that the first sentence of Section 58-784.2, which you quoted in your letter, is modified by the further language from that section to the effect that "the period between general reassessments shall not exceed six years in any other case." In order to understand this matter thoroughly, it is necessary to review the purpose of the language contained in the first sentence of this section and the various subsequent amendments, which I will not attempt to explain in this letter.

I wish to call attention to Section 58-784.3, which authorizes the governing body of any county to make a general reassessment of the real estate in the county in any year if the governing body so directs by a majority of all the members thereof by a record "yea" or "nay" vote. Under this latter section, your Board has the power to make a general reassessment in 1960, but these assessments would not be available as a basis for taxation until the taxable year of 1961.

The power of the county to levy taxes for general county purposes has never been considered to be impaired by the failure of the county to make the general reassessments within the six year period prescribed by statute. The power of the county to levy upon real estate and personal property for the purpose of raising revenues is a continuing power and may be exercised by your board of supervisors for the taxable year of 1960, although no general reassessment was made in the year 1959.

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TAXATION—Gross Receipts—Applicable to Boxing and Wrestling Matches Held in Virginia and Televised or Broadcast—Place of Negotiation of Contract Immaterial. (23)

MR. D. ANDREW WELCH, Chairman
Virginia Athletic Commission

July 17, 1959

This is in response to your letter of June 29, requesting the advice of this office. The questions presented are hereinafter set forth with our opinion placed at the conclusion of each question.

"(1)—Is a sanction necessary for the presentation of Professional Wrestling when broadcast or televised from a studio in Virginia, when the agreement is made within the Commonwealth?"
REPORT OF THE ATTORNEY GENERAL

A. Section 9-24, Code of Virginia, provides:

“No wrestling, boxing or sparring exhibition shall be conducted by any club, organization or corporation having a license to conduct any such exhibitions in this State except by a sanction or permit from the Commission.”

As the actual match is conducted in Virginia (and customarily viewed by a studio audience) in the studio or elsewhere when televised, the provisions of Section 9-24 above would require a sanction or permit.

“(2)—If the answer to the foregoing is in the affirmative, does the 5% State tax apply, and if so, against whom?”

A. Section 9-29, as amended, provides in part as follows:

“Every producer shall, within twenty-four hours after the termination of every match, contest or exhibition, furnish to the Commission a written report, duly verified by the promoter or one of its officers, showing the number of tickets sold for such match, contest or exhibition, and the amount of gross proceeds thereof, and such other matters as the Commission may prescribe; and shall also within such time, pay to the Commission a tax of five per centum of its total gross receipts from the sale of tickets of admission to, and rights to broadcast by radio or television, such match, contest or exhibition.

“Every promoter, matchmaker and booking agent shall, within twenty-four hours of the termination of every match, contest or exhibition, furnish to the Commission a report, duly verified by such promoter, matchmaker or booking agent or one of its officers, showing the amount of the gross fee, charge, commission or other consideration received or to be received by such promoter, matchmaker or booking agent, and also showing such other matters as the Commission may prescribe; and shall also within such time pay to the Commission a tax of five per centum of such amount.”

Pursuant to the above statutes, this office is of the opinion that the 5% State tax would apply to the producer and the promoter, matchmaker or booking agent, as the case may be.

“(3) In event the answers to the foregoing are in the affirmative, would the same application be in force with regards to Boxing, when presented under similar circumstances?”

A. As the applicable statutes cover boxing as well as wrestling, the above conclusions would apply equally when presented under similar circumstances.

“(4) If the contract were negotiated outside of Virginia, with the event broadcast or televised from within the State, would the 5% levy apply against receipts from same?”

A. I am of the opinion that the 5% levy upon receipts would apply when such events are broadcast or televised within the State where the contract for such performance was negotiated outside of Virginia. The same incidents for which regulation by the State is provided occur in Virginia, and the fact that the contract might be negotiated outside of Virginia would not affect the application of such levy.

In conclusion, I am advised that the State of Pennsylvania has substantially similar provisions of law, and that the practices of that State are in conformity with the views expressed herein.
REPORT OF THE ATTORNEY GENERAL

TAXATION—House Trailers—County May Not Adopt Ordinance Except Pursuant to §§ 35-64.1 et seq. (194)

December 30, 1959

HONORABLE GEORGE F. ABBITT, JR.
Commonwealth's Attorney for Appomattox County

This is in reply to your letter of December 29, 1959, which reads as follows:

"The Board of Supervisors of Appomattox County has requested me to inquire of you as to whether or not it is lawful and permissible for them, as the Board of Supervisors of our County, by resolution or ordinance, to require landowners who permit trailers, particularly house trailers, to park on their property, to file with the Commissioner of Revenue a certificate or notice that such trailers are using the landowner's property.

"In other words, the Board wants to know if they can by resolution assist the Commissioner of Revenue to locate and determine when trailers are brought into our County so that he may assess the trailers and its furnishings for taxation."

The powers of the Board of Supervisors with respect to the operation of trailer camps and trailer parks and the parking of trailers are contained in §§ 35-64.1 through 35-64.6 of the Code. These sections authorize the counties to impose and collect a license tax from any person operating or conducting any trailer camp or any trailer park, as defined in § 35-64.3, and provides a penalty for failure to obtain such license. In my opinion, the provisions of these sections do not authorize a local governing body to enact and enforce an ordinance of the nature suggested in your letter.

Whenever any County adopts a license ordinance under these sections, it would, I assume, require the license to be obtained from the Commissioner of the Revenue and, as a result, he would obtain knowledge of the locations where trailers may be situated within his jurisdiction.

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TAXATION—Income—Liability of Resident to Pay Tax on Income Earned Out of State. (371)

June 2, 1960

HONORABLE EDGAR T. REEVES, JR.
Commonwealth's Attorney for Mathews County

This is in reply to your letter of May 26, which reads in part as follows:

"A question has arisen as to the liability of Dr. John R. Gill, Jr. to the Commonwealth of Virginia for state income tax for the year 1959. Mr. Bernard L. Morgan, Commissioner of the Revenue of Mathews County, notified young Dr. Gill's father, Dr. John R. Gill, Sr., that such liability existed and the matter having been referred to me, I am of opinion that the liability is doubtful and feel that an opinion from your office is indicated.

"The facts are as follows: Dr. John R. Gill, Jr., has been a lifelong resident of Mathews County and has paid his poll tax and voted here
since he became 21, last voting in July, 1959. From January 1 to June 30, 1959, he was a member of the Armed Forces of the United States, assigned to the National Institute of Health, Bethesda, Maryland, and resided in the District of Columbia. Shortly after July 1, 1959, he entered the University of Copenhagen, in Denmark, to continue his medical studies. He earned no income in Virginia during the year.

"While with the National Institute of Health, state income tax to the State of Maryland was deducted from his salary and a return was filed to the State of Maryland, based upon an income of approximately $4,000.00."

It is my opinion that the taxpayer in the above situation is required to file a Virginia income tax return for the year 1959, reporting the income earned in Maryland while in the Armed Forces, and to pay the tax thereon. The reason is that, even though the taxpayer left Virginia when he entered the Armed Forces, he nevertheless is considered a Virginia domiciliary under the provisions of Section 58-77(8) of the Code of Virginia as he did not leave with intention of permanently abiding outside this State. This is especially so in view of the fact that he returned to vote here.

Moreover, I am of the opinion that the taxpayer, in computing his Virginia income tax, is not entitled to the credit provided in Section 58-103 of the Code of Virginia for the Maryland tax paid on the same income. This is because Section 58-103 provides, inter alia:

"The credit provided for by this section shall not be granted to a taxpayer when the laws of another state, under which the income in question is subject to tax assessment, provide for a credit to such taxpayer substantially similar to that granted by Section 58-104 of this chapter."

It is my understanding that Maryland has a statutory provision providing for a credit substantially similar to the credit provided for in Section 58-104 and consequently the taxpayer, in computing his Maryland tax, would be entitled to a credit based on the income tax paid to Virginia.

In passing, I would like to point out that the taxpayer in the above situation was not liable for Maryland income tax under the provisions of the Federal Soldiers' and Sailors' Civil Relief Act (50 USCA App. Sec. 574) which exempts servicemen from state income taxation other than by the state of their domicile.

I am, therefore, of the opinion that the taxpayer should pay the Virginia tax on the income earned in Maryland and then submit an application to the Maryland Tax Commission for a refund of the entire income tax paid there.

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TAXATION—Income—Resident Must File Return on Income Earned in Another State Even Though Tax Already Paid in Other State. (408)

HONORABLE E. SUMMERS SHEFFEY
Commonwealth's Attorney for Washington County

June 29, 1960

This is in reply to your letter of June 27, 1960, which reads, in part, as follows:

"The question concerns the right of an actual domiciliary resident of the state of Virginia to credit on his Virginia income tax return
the amount of tax he has paid to the state of New York while temporarily residing and working therein.

"As I understand the law whenever a domiciliary resident of Virginia has become liable to income tax to another state (in this case New York) as a non-resident of such a state the amount of income tax payable by him to Virginia shall be credited on his return with the net income tax so paid by him to such other state upon his producing to the Commissioner of Revenue satisfactory evidence of the facts and of such payment. Moreover it is my understanding that a person taking the standard deduction cannot claim credit for any net income tax paid any other state.

"The Commissioner of Revenue of Washington County takes what I consider to be a position contrary to the law as I understand it. He insists that the domiciliary resident should file and pay tax to Virginia upon his net income derived from all sources and then attempt to obtain a refund from the state (New York) to which he has paid tax as a non-resident. It is my position that the taxpayer, upon presentation of proof of payment to said other state is entitled to credit the amount of payment to the other state to his Virginia net income tax."

Section 58-103 of the Code of Virginia reads as follows:

"Whenever a resident individual of this State has become liable to income tax to another state, as a nonresident of such state, upon his net income, or any part thereof, for the taxable year, derived from sources without this State and subject to taxation under this chapter, the amount of income tax payable by him under this chapter shall be credited on his return with the income tax so paid by him to such other state upon his producing to the proper assessing officer satisfactory evidence of the facts and of such payment. The credit provided for by this section shall not be granted to a taxpayer when the laws of another state, under which the income in question is subject to tax assessment, provide for a credit to such taxpayer substantially similar to that granted by § 58-104 of this chapter. This section shall also apply to a former domiciliary or actual resident of another state who removed to this State during the taxable year and was a resident of this State on the last day of the taxable year but was compelled to pay the state of his former domicile or actual residence a net income tax for that part of the taxable year during which he was such domiciliary or actual resident."

I am of the opinion that the taxpayer referred to in your letter is not entitled to a credit for the income taxes paid to New York, and he should file a Virginia income tax return, reporting thereon the income derived from sources within New York, as well as in Virginia, and pay the tax thereon. This is because the above section expressly states that:

"The credit provided for by this section should not be granted to a taxpayer when the laws of another state, under which the income in question is subject to tax assessment provide for a credit to such taxpayer substantially similar to that granted by § 58-104 of this Chapter."

It is my understanding that New York will grant the Virginia taxpayer, who would be a non-resident of that State, a credit substantially similar to that provided in Section 58-104, and, therefore, he can file a refund application with the appropriate New York tax authorities, setting out the facts and circumstances involved.
TAXATION—Licenses—Local—Towns May Impose Upon Insurance Agent—May Not Impose Upon Newspaper Publisher—Transient Photographer and Exterminator Depends Upon Facts. (21)  

July 16, 1959  

HONORABLE RUTH J. SIZEMORE, Clerk  
Town of Clarksville  

This is in response to your letter inquiring if the Town of Clarksville may impose license taxes upon an insurance agent, a newspaper publisher, out-of-town exterminator and transient photographer.  

This office is of the opinion that, pursuant to Sections 58-266.1 and 58-386, Code of Virginia, a license tax may be imposed upon an insurance agent.  

Moreover, pursuant to the provisions of said Section 58-266.1, a local license tax upon a newspaper publisher is prohibited.  

With regard to the authority to impose a tax upon an out-of-town exterminator, the exact nature of his operation should be determined, together with the facts as to whether or not he operates in other States and whether or not he is licensed elsewhere. It is possible that the work done by such exterminator might classify him as a "contractor", pursuant to Section 53-97.  

With regard to the license of a transient photographer, I enclose herewith for your consideration and application to facts as they may exist, copies of two former opinions of this office, one dated December 30, 1957, to the Honorable Grady Dalton, which is contained in the 1957-58 Report of the Attorney General at page 271, and the other dated June 18, 1958, to the Honorable C. H. Morrissett, State Tax Commissioner, which is contained in the 1957-58 Report of the Attorney General at page 276.  

TAXATION—License—Taxes—Exemptions—Agricultural Fairs. (60)  

August 18, 1959  

HONORABLE JULIUS GOODMAN  
Commonwealth's Attorney for Montgomery County  

This is in reply to your letter of August 17, 1959, regarding the question of State and local taxation and whether or not an organization would qualify as an Agricultural Fair and thereby be exempt from license taxes. You further advise that a bona fide agricultural fair sponsored by the Montgomery County Farm Bureau was held in the county on August 7 and 8 of 1959. You further advise that the organization promoting the contemplated fair is a private stock corporation which has contracted with a carnival to play on ground owned by the organization with the consideration derived from this carnival to go to the private organization, and that the agricultural exhibits and industrial arts to be had are of a very limited nature with few animals to be exhibited and apparently with little participation therein by the farmers of the county.  

If the organization cannot qualify as an agricultural fair, then Sections 58-283 and 58-284.1 permit counties to levy license taxes upon such shows or carnivals, as you state the county has already done. Moreover, Section 58-284 provides for a State license tax of $1,000.00 in addition to the license tax required by other provisions of this article upon a carnival, etc., held within such county within fifteen days previous to, or during the week of, or within one week after the time of holding any agricultural fair in such county. At other times, this office is advised by the State Department of Taxation that Section 58-278 would be applicable to such carnivals which do not qualify as agricultural fairs. More-
over, the said department states that in such instances an application has to be made at the department, a bond set and then a license secured from the local commissioner of revenue. It also advises that each day that the carnival is held is considered a performance.

In order to decide whether or not a particular organization holding an exhibition would be exempt from license taxes, the various facts pertaining thereto would have to be considered. This office, necessarily not having all the facts of a particular situation, could not rule as to whether or not a particular exhibition would qualify under the tax exemption. However, attention is directed to the exemption requirement that the organization holding the exhibit must hold a legitimate agricultural exhibition, etc., and accordingly it should be a bona fide agricultural fair. Moreover, exemptions to statutes providing for taxes are generally given strict construction against the person seeking to qualify under the exemption. In conclusion, it is suggested that all of these various factors be considered in determining whether or not the exhibition in question would qualify as a bona fide agricultural fair.

TAXATION—Motor Fuels—To be Paid by Dealer—New Tax Increase Not Applicable to Fuel in Possession of Retailer or Consumer. (395)

HONORABLE CHARLES R. FENWICK
State Senate
HONORABLE FITZGERALD BEMISS
State Senate

This is in reply to your letters of June 14, in which you enclose a copy of Bulletin No. 210 issued by the Division of Motor Vehicles on May 13, 1960. This bulletin contains the following paragraph:

"The 1 cent increase in the motor fuel tax and special fuels tax becomes effective at 12:01 A.M. on July 1, 1960 and applies to all tax-paid gallonage in the hands of distributors and resellers in Virginia. This office is attempting to supply every tax-paid distributor, reseller and service station operator the forms on which to report and pay the 1 cent tax on their inventory at the close of business or at midnight on June 30. To this end, we will supply to all licensed Motor Fuel Dealers, Limited Dealers, Jobbers, Limited Jobbers and Peddlers, the required number of report forms together with addressed envelopes with the request that these forms and envelopes be delivered by the Tank Wagon Salesmen to their customers on or before the close of business on June 30. There are numerous distributors of gasoline operating within Virginia who are not required by law to be licensed. Your assistance in distributing the forms and envelopes to these distributors is also requested. This procedure will be of great assistance to this office and will eliminate the duplication of supplying report forms."

Issuance of the bulletin in question was occasioned by the enactment of Chapter 603 of the Acts of Assembly, 1960, wherein the motor fuel tax imposed under Section 58-711 of the Code is increased from six cents per gallon to seven cents per gallon, effective July 1, 1960. The Division of Motor Vehicles is of opinion that the one cent increase is applicable to motor fuel contained in the storage tanks of retail distributors, or service stations, at the close of business at midnight June 30, 1960.
You have requested my opinion as to whether or not the tax increase may be imposed and collected upon motor fuel owned by a retailer, or service station operator, at the close of business on June 30, 1960. The only amendment made to Section 58-711 that is material to your question was the change in rate of tax from six cents to seven cent per gallon. This section contains the following language:

"The tax herein levied shall be collected in the manner hereinafter provided."

The method for collection of the tax is set forth in Section 58-713 of the Code. Under this section every dealer in this state is required to make a report to the Commissioner of Motor Vehicles showing:

"(1) The quantity of motor fuel on hand on the first and the last days of the preceding calendar month;
(2) The quantity of motor fuel received, produced, manufactured, refined or compounded during the preceding calendar month;
(3) The quantities of motor fuel sold and delivered or used within the State during the preceding calendar month; and
(4) The quantities of motor fuel sold or delivered to a limited dealer."

This report is required to be filed on or before the last day of each calendar month, and at the time of rendering the report, the dealer is required to pay to the Commissioner the tax levied under Section 58-711 on all motor fuel sold and delivered or used within this State during the preceding calendar month, except that which is sold to a limited dealer.

The term "dealer" is defined in Section 58-687(4) of the Code. A retailer or service station operator is not included within this definition.

The term "used in this State" is defined in Section 58-687(11) of the Code as follows:

"(11) 'Used in this State' shall mean and include, in addition to its original meaning, the receipt of fuel by any person into a service tank of a motor vehicle."

This definition is new, having been enacted as a part of Section 58-687 by Chapter 231, Acts of Assembly of 1960. This amendment, I understand, was designed to close certain loopholes discovered by the Commissioner. This amendment will strengthen the hand of the Commissioner in his enforcement of the payment of the tax on motor fuel, used in the operation of motor vehicles,—which has been neither sold nor delivered by a dealer to a retailer.

In my judgment, however, this amendment cannot be construed to impose an additional tax upon the motor fuel remaining in the tanks of a retailer or consumer on June 30, 1960, if such motor fuel has previously been sold to the retailer or consumer by a dealer and the statutory tax in effect at the time of the sale has been paid to the dealer by the retailer or consumer.

The rate of tax in effect when a dealer sells motor fuel to a retailer must control, unless there is clear and unequivocal language to the contrary. The courts of this State have consistently adhered to the rule that taxing statutes must be strictly construed and that no taxes may be assessed and collected by inference as to legislative intent.

There is no statutory provision under which the Division of Motor Vehicles is authorized to assess and collect from a retailer or service station operator the tax imposed by Section 58-711, nor is there any statute requiring the retailer to collect from the consumer the tax imposed under Section 58-711.
Every dealer is required to account for the tax-assessable under Section 58-711 as of the date of sale by him to the retailer. When motor fuel is delivered to a retailer and such retailer has paid a tax at the rate then prescribed by law, such motor fuel is not thereafter taxable. In other words, once the tax has been paid by the person liable for such payment at the legal rate in effect on the date of sale, such tax-paid motor fuel would not thereafter be subject to the additional tax imposed by Chapter 603, unless the amendment increasing the tax as of July 1, 1960, specifically prescribed that the difference between the old and new rate of taxation shall be collected from the person in possession of motor fuel at the time the new rate becomes effective.

I am of opinion, therefore, that the Commissioner of the Division of Motor Vehicles does not have authority to require the retailers or service station operators to report the amount of motor fuel on hand at midnight, June 30, 1960, nor to require them to pay the tax of one cent per gallon on such quantity of motor fuel.

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TAXATION—Personal Property—Motor Vehicles—Situs for Taxation—When Leased, etc. (297)
Motor Vehicles—License Taxation—Lessor's Residence Determines. (297)

March 31, 1960

HONORABLE ROBERT H. WALDO
Commissioner of Revenue of Norfolk County

This is to acknowledge receipt of your letter of March 28, 1960 in which you request the opinion of this office concerning proper taxing authorities of certain motor vehicles. You state that these motor vehicles are leased by corporations whose principal offices are in Norfolk County to individuals or firms with their principal offices or places of business in the City of Portsmouth. Furthermore, both the County of Norfolk and the City of Portsmouth have enacted ordinances imposing taxes on motor vehicles, trailers and semi-trailers.

I shall answer your questions seriatim:

1. To which taxing authority should personal property tax be paid under the following circumstances:

   QUESTION: a. Lessee has its principal business in the City of Portsmouth, and the operator of the leased vehicle garages the same within the corporate limits of the City of Portsmouth.

   ANSWER: According to the provisions of Section 58-834 of the Code, the situs for assessment and taxation of tangible personal property is the county or city in which such property is physically located on the first day of the tax year. Your attention is also invited to the case of Hogan v. County of Norfolk, 198 Va. 735 in which the court while construing said section stated:

   "The situs for taxation as used in this statute means something more than simply the place where the property is. It does not mean property which is casually there or incidentally there in the course of transit, but it does necessarily involve the idea of permanent location like real property. It is sufficient if it is there and being used in such a way as to be fairly regarded as part of the property of the county."

   Therefore, it is my opinion that the City of Portsmouth has the authority to
assess and levy the personal property tax on motor vehicles which are normally garaged within the corporate limits of said city on the first day of the tax year.

QUESTION: b. Lessee has its principal business in the City of Portsmouth, and the operator of the leased vehicle garages the same within the political boundary of the County of Norfolk.

ANSWER: The County of Norfolk would have the authority to assess and levy the personal property tax on motor vehicles which are normally garaged within Norfolk County on the first day of the tax year.

2. To which licensing authority should application be made for license tags under the following circumstances:

QUESTION: a. Lessee has its principal business in the City of Portsmouth, and the operator of leased vehicle garages the same within the corporate limits of the City of Portsmouth.

ANSWER: The authority for a city or county to levy and assess taxes on motor vehicles is contained in Section 46.1-65 of the Code (Chapter 22, Acts of 1959). The prohibition against taxing motor vehicles by cities and counties is contained in Section 46.1-66 (Chapter 22, Acts of 1959). Pertinent portions of those sections are:

"Section 46.1-65. Except as provided in § 46.1-66 counties, incorporated cities and towns may levy and assess taxes and charge license fees upon motor vehicles, trailers and semitrailers * * * * Such license fees and taxes shall be imposed in such manner, on such basis, and for such periods, as the proper authorities of such counties, cities and towns may determine, and subject to proration for fractional periods of years in the manner prescribed in § 46.1-165.

"Section 46.1-66. (a) No county, city or town shall impose any tax or license fee upon any motor vehicle, trailer or semitrailer when:

"(1) A similar tax or license fee is imposed by the county, city or town of which the owner is a resident;

"(b) Except as provided in § 46.1-65 no county shall impose any license fee or tax upon a motor vehicle, trailer or semitrailer of an owner resident in an incorporated city or town within the county when such city or town imposes a license fee or tax upon motor vehicles, trailers or semitrailers."

The language in these sections certainly indicates that the taxing authority is that where the owner resides and once that authority has acted it precludes other taxing authorities from imposing a like tax.

The lessor is generally considered the owner of a motor vehicle within the registration provisions of the Motor Vehicle Code. Section 46.1-1 (18) defines the word "owner." You will notice that it includes the lessor unless the instrument creating the lease vests the lessee with the right of immediate possession and the right to purchase upon the performance of conditions stated in the agreement. Under the provisions of the Motor Vehicle Code, the lessor is considered the owner for registration purposes and is required to pay the license fee (Sections 46.1-41 and 46.1-149 of the Code). The owner applying for registration declares in his application his residence and the registration card issued by the Division of Motor Vehicles, of course, lists the address indicated.

It is my opinion that whereas the lessor (owner) is a resident of Norfolk
County, that county has the authority to assess the license taxes on these motor vehicles although the same may be garaged in the City of Portsmouth.

QUESTION: b. Lessee has its principal business in the City of Portsmouth, and the operator of the leased vehicle garages the same within the political boundary of the County of Norfolk.

ANSWER: For the same reason expressed in (a), I am of the opinion that Norfolk County has the authority to impose the license taxes on these motor vehicles, the lessor being a resident of said county.

TAXATION—Personal Property—Rate of Levy—May be Different From Rate on Real Property—Statute May Not Prohibit Locality From Levying Tax. (191)

December 21, 1959

HONORABLE EDWARD E. LANE
Member House of Delegates

This will reply to your letter of December 18, 1959, in which you present the following inquiry:

"I would appreciate your advising me whether or not legislation prohibiting a locality from levying a personal property tax would in any way violate the Constitution of Virginia. I have specific reference to the last sentence in Section 169 of the Constitution."

Section 169 of the Constitution of Virginia (1902) as amended declares:

"Except as hereafter provided, all assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. So long as the State shall levy upon any public service corporation, other than a railway or a canal corporation, a State franchise, license, or other tax, based upon or measured by its gross receipts, or gross earnings, or any part thereof, its real estate and tangible personal property shall be assessed by the State Corporation Commission, or other central State agency, in the manner prescribed by law. The General Assembly may allow a lower rate of taxation to be imposed for a period of years by a city or town upon land added to its corporate limits, than is imposed on similar property within its limits at the time such land is added. The General Assembly may define as a separate subject of taxation household goods and personal effects and may allow the governing bodies of counties, cities, and towns to exempt or partially exempt such property from taxation." (Italics supplied).

Consistent with the terminal prescription of the above quoted constitutional provision, the General Assembly has defined and classified "household goods and personal effects" as separate items of taxation and has authorized the governing bodies of the various counties, cities and towns of the Commonwealth to exempt all or any of such items from local taxation for the tax years beginning on and after January 1, 1959. The concluding sentence of Section 169 of the Virginia Constitution does not authorize the General Assembly to permit local governing bodies to exempt all tangible personal property from taxation, nor does it purport to empower the General Assembly to prohibit
local taxation of any items of tangible personal property by legislative decree. I am, therefore, of the opinion that the validity of "legislation prohibiting a locality from levying a personal property tax" could not be predicated upon the language of Section 169 to which you refer, and that legislation of the type under consideration would contravene the provisions of Sections 168 and 171 of the Virginia Constitution.

In this connection, however, I would call your attention to the initial paragraph of Section 58-851 of the Code of Virginia (1950) as amended, which provides:

"The governing body of any county, city or town in laying levies on all taxable real estate, tangible personal property and merchants' capital may impose one rate of levy on real estate, another rate of levy on tangible personal property and another rate of levy on merchants' capital or it may impose the same rate of levy on any two or all of these subjects of taxation."

In light of the above quoted provision, it is manifest that the rate of levy imposed upon tangible personal property is within the exclusive control of the governing bodies of the various counties, cities and towns of the Commonwealth, that such rate need not be the same as that imposed upon real property and that such rate is not subject to either maximum or minimum restrictions prescribed by the General Assembly. Thus, under existing law, the impact of tangible personal property taxes may be increased or minimized at the discretion of the governing bodies of the various political subdivisions of the Commonwealth.

TAXATION—Personal Property—Soldiers' and Sailors' Civil Relief Act Does Not Exempt "Resident" of Virginia. (226)

Februrary 5, 1960

HONORABLE ROBERT LEE SIMPSON
Commonwealth's Attorney for Princess Anne County

This is in response to your letter of February 3, requesting the opinion of this office on the following question:

"Taxpayer is a native born Virginian, having resided in the state all of his life. He was for a period of twenty years a member of the armed forces, having been a resident of the state at the time of entry into the service, and is now separated from the service by reason of retirement. He has for the past several years been a resident of the County of Princess Anne and owner of tangible personal property. Is taxpayer, under the provisions of the Soldiers' and Sailors' Civil Relief Act, relieved of the payment of personal property tax assessed against him for property situate within this County? Firstly, during the period he was an active member of the armed forces and, secondly, during the period commencing with his retirement?"

The pertinent provision of the Soldiers' and Sailors' Civil Relief Act (50 U.S.C.A. App. 574) provides in part that "for purposes of taxation * * by any State * * such person shall not be deemed to have lost a residence or domicile in any State * * by reason of being absent therefrom in compliance with military * * orders, or to have acquired a residence or domicile in * * any, other State * *". The said act further provides that "* * personal property shall not be deemed * * to have a situs for taxation * *" in any State of which such person is not a resident or in which he is not domiciled.
In other words, residence (or domicile) is not lost by the fact that a person is absent on military orders, and the prohibition against taxation extends only to the State, etc., of which such person is not a resident. The said act does not prevent taxation by the State of residence or domicile. Accordingly, as your letter states that the taxpayer has "resided in the state (Virginia) all of his life", and there are no facts given to show any loss of residence by reason of his being absent from the State on military orders, this office is of the view that the provisions of the Soldiers' and Sailors' Civil Relief Act do not relieve payment of such taxes during the period the taxpayer was in the armed forces or during the period commencing with his retirement.

TAXATION—Real Estate—Abatement—No Statute Authorizing Where Transferred to Tax Exempt Church or School. (129)

October 16, 1959

HONORABLE CHARLES G. STONE
Commonwealth's Attorney for Fauquier County

This is in reply to your letter of October 15, 1959, which reads as follows:

"A legal question has been put to me on which I shall appreciate your opinion.

"On March 19, 1959 a local church bought from an individual and thereupon took possession of a parcel of real estate in this County for religious and educational purposes. Under Section 58-12 this property would be exempt from County real estate taxes. However, taxes become a lien on property as of the first of January of each year.

"The question is, would our Board of Supervisors, if it saw fit, be authorized to exonerate this real estate from the County Tax, as of March 19, 1959, and to require only the prorata of the tax bill from January 1 to March 19, 1959 to be paid the County Treasurer?"

Article 5, Chapter 15, of Title 58 of the Code contains the provisions with respect to partial abatement or proration of taxes. Section 58-818 authorizes an abatement on a prorata basis when the United States acquires real estate and Section 58-822 contains similar authority where land is acquired by the State, a county or a municipality. There is no similar statute authorizing the abatement of taxes on land where title has been transferred to a religious or educational organization that is entitled to a tax exemption.

I am, therefore, of the opinion that the board of supervisors does not have authority to exonerate the real estate in question from any portion of the tax which accrued against the former owner on January 1 of the year in which the title to the property was transferred.

TAXATION—Real Estate—County May Not Tax Property at the Time of Conveyance in Addition to Annual Assessment. (342)

May 9, 1960

HONORABLE JOHN C. WEBB
Member, House of Delegates

This is in reply to your letter of May 5, which reads as follows:
"Under Section 171 of the Constitution of Virginia real estate and tangible personal property except the rolling stock of public service corporations are segregated for and made subject to local taxation only. Up to this time the usual form of real estate taxation has been based on an assessed valuation and such property being taxed each year.

"I would like to have your opinion as to whether or not the counties of Virginia could, in addition to present taxes, impose a tax of two percent of fair market value of such property which tax should be due and payable at the time a deed conveying the property is recorded in the Clerk's Office of said County.

"Please bear in mind that the tax I suggest would be a tax on the real estate itself, not on the transfer of real estate. The date of payment on the tax would, however, be related to date of recordation of deed conveying said property."

In my opinion, the imposition of a tax of this nature would be in violation of Section 168 of the Constitution, which reads as follows:

"All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The General Assembly may define and classify taxable subjects, and, except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes may be levied."

Taxes are required to be uniform upon the same class of subjects within the jurisdiction of the taxing authority. Under the plan suggested by you, whenever during a taxable year property is sold, that property would be taxed at a rate in excess of the rate of taxation upon all other property of the same class that is not transferred during the same taxable year.

TAXATION—Real Estate Sold for Delinquent Taxes—Disposition of Surplus. (210)

January 15, 1960

HONORABLE E. D. JARMAN

Treasurer for Greene County

This is in reply to your letter of January 13, 1960, which reads as follows:

"I would like to know the ruling on the following:

"A piece of land in the name of Ernest Dangerfield was sold December 14, 1959 for the 1957 real estate taxes. Two persons bid on this land and the land was sold to the man that bid $60.00 (sixty dollars) above the taxes.

"This money (sixty dollars) is in this office and I do not know what to do with it. The man that only bid the amount of tax made the first bid, and states that if the $60.00 bid cannot be accepted, that he should get the land. Of course, the man that bid the sixty dollars ($60.00) already has the tax tickets for the years, 1957, 1958 and 1959. All of these transactions have been carried through this office except the
§60.00. The audit for the turnover was done the last week of December, 1959, and the auditors have listed the $60.00 as cash in the office."

There is no statutory provision specifically covering the point which you have raised. Under the provisions of Article 2, Chapter 21, under which I assume the sale was made, you are required to make a report of the sale to the court (Section 58-1038 of the Code). I would suggest in your report to the court that you recite the fact that in the sale of this property the purchase price exceeds by $60.00 the amount to which the county is entitled for delinquent taxes and ask the court to direct you as to what disposition to make of this surplus.

The owner of the property, of course, has the right to redeem his property under Section 58-1043 upon the payment of the whole amount paid by the purchaser and such additional taxes as may have accrued for subsequent years.

I discussed this matter today with Honorable C. H. Morrissett, State Tax Commissioner, and he states that, in his judgment, the surplus amount involved in the sale of the property should be credited to a special account pending final disposition thereof.

There is no statutory provision which would authorize you to pay the excess to the former owner of the property.

TAXATION—Real Property—Political Subdivisions May Not Define and Classify Taxable Subjects or Set Lower Tax Rate on Real Property Owned by a “Particular Class or Group of People.” (269)

March 17, 1960

HONORABLE JOHN E. RAINÉ, Chairman
Commission on the Aging

I am in receipt of your letter of March 10, 1960, in which you inquire whether or not, under existing law, the governing bodies of the various counties and cities of the Commonwealth could establish a lower assessment formula or a lower tax rate on real property owned by "a particular class or group of people". From your communication, it appears that your inquiry relates specifically to real property owned by elderly and retired persons who have a "definitely fixed" income.

I am constrained to believe that your inquiry must be answered in the negative. In this connection, Section 168 of the Constitution of Virginia (1902) provides:

“All property, except as hereinafter provided, shall be taxed; all taxes, whether State, local or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws. The General Assembly may define and classify taxable subjects, and, except as to classes of property herein expressly segregated for either State or local taxation, the General Assembly may segregate the several classes of property so as to specify and determine upon what subjects State taxes, and upon what subjects local taxes may be levied.” (Italics supplied).

In light of the language italicized above, it is manifest that all local and municipal taxes on real property must be uniform upon the same class of subjects and that the power to define and classify taxable subjects is vested in the General Assembly and not in the governing bodies of the various political subdivisions of the Commonwealth. Therefore, I am of the opinion that the governing bodies of counties and cities of the Commonwealth could not per-
missibly establish a lower assessment formula or a reduced tax rate on real property owned by a particular class or group of people.

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TAXATION—Recordation—Deed from One Spouse to both as Tenants by Entireties to be Taxed at Full Value of Land Conveyed. (361)

May 24, 1960

HONORABLE C. H. MORRISSEY
State Tax Commissioner

On May 16, 1960, you inquired as to the opinion rendered by this office on January 21, 1957, to the Honorable Jesse D. Clift, Clerk of the City of Martinsville (Opinions 1956-1957, p. 261) concerning the amount of recordation tax to be charged in cases where a husband conveys real estate to his wife and himself as tenants by the entireties with right of survivorship as at common law.

In this opinion, this office concluded that the recordation tax should be based upon one-half of the actual value of the real estate conveyed. Upon reconsideration, however, I have concluded that this opinion was erroneous and that, in the above case, the recordation tax should be based upon the entire value of the property conveyed.

The first paragraph of Section 58-54 of the Code of Virginia reads as follows:

"On every deed, except a deed exempt from taxation by law, which is admitted to record, the tax shall be fifteen cents on every hundred dollars or fraction thereof of the consideration of the deed of the actual value of property conveyed, whichever is greater."

Section 58-61 of the Code of Virginia (entitled "What other deeds not taxable") reads as follows:

"No additional recordation tax shall be required for admitting to record any deed of confirmation or deed of correction or deed in which a husband and wife being joint tenants or tenants by the entireties whether or not with right of survivorship as at common law are both grantors and grantees from themselves to themselves, the only change being one of tenancy, when the tax has been paid at the time of the recordation of the original deed; provided, that, if the tax already paid is less than a proper tax based upon the full amount of consideration or actual value of the property involved in the transaction, and additional tax shall be paid based on the difference between the full amount of such consideration or actual value and the amount on which the tax has been paid." (Amendment of 1952 italicized).

It is noted that the case in question does not fall within the modifying provisions of the 1952 amendment to Section 58-61 of the Code of Virginia. This is because the husband was the fee simple owner of the real estate at the time of the conveyance to himself and wife as tenants by the entireties with the right of survivorship as at common law.

A deed from a husband to his wife and himself as tenants by the entireties with survivorship actually conveys the entire parcel of real estate and not merely one-half interest thereof. Such a conveyance creates a different property interest and the title and incidents of ownership of the entire parcel of real estate after the conveyance are essentially different from what they were before the conveyance. In this respect, see, Vasilion v. Vasilion, 192 Va. 735, 66 S. E.
I am, therefore, of the opinion that the recordation tax should be based upon the entire value of the property conveyed rather than upon one-half of its value.

TAXATION—Recordation—Deeds of Trust Securing Loans by United States or Agencies Thereof—No Recordation Tax Assessable Unless Federal Statute Permits. (305)

April 7, 1960

HONORABLE J. M. REVERE
Clerk of Middlesex County Circuit Court

This is in reply to your letter of April 6, 1960, which reads as follows:

"A few weeks ago I recorded in this office a Deed of Trust of Mr. ---------, which is a Veterans direct loan through the regional office in Roanoke, on which I charged the usual 15 cents per hundred State Tax.

"I have now been requested by the Veterans Administration to refund this amount to Mr. ---------, but Section 58-55 of the Code of Virginia, does not exempt this tax charge. Therefore, I would like your opinion in this matter."

I am enclosing copy of an opinion dated March 15, 1950, and published in the Report of the Attorney General for 1949-'50, at page 230, which I believe is applicable to the question presented by you. As I understand your letter, the Veterans Administration, an agency of the federal government, has made a direct loan which has been secured by a deed of trust recorded in your office.

§ 58-64, which sets forth certain exemptions to the recording tax imposed by §§ 58-54 and 58-55, does not specifically exempt the deed of trust in question. However, as pointed out in the opinion which I am enclosing, the recordation tax cannot be collected upon deeds of trust securing a loan made by the United States Government or one of its agencies unless the Act creating the agency or some other federal Act permits the imposition of such recordation tax.

I assume the loan in question was made pursuant to Section 1811, Title 38, United States Code Annotated. I am unable to find any language in this statute permitting the States to impose this tax.

TAXATION—Recordation—Deeds of Trust—Tax Based on Total Amount to be Secured Thereby. (266)

March 16, 1960

HONORABLE J. FULTON AYRES
Clerk of Circuit Court for Accomack County

This is in reply to your letter of March 9, 1960, in which you state that a deed of trust has been admitted to record in your office which contains the following clause:

"And also to secure unto the Beneficiary, its successors and assigns, the repayment of such future advances or loans as may be made by the Beneficiary to the Grantor within a period of three (3) years from the date hereof, not exceeding, however, at any one time outstanding, the maximum amount of FIFTY THOUSAND AND NO/100 DOLLARS ($50,000.00) which future advances and loans shall be
You further state:

"The loan under the first clause of this deed of trust was $38,000.00, which amount we collected tax on, but under this second clause, it is my understanding that the grantor may borrow an additional $50,000.00 without a second deed of trust in a period of three years."

It would appear that under this deed of trust the amount actually secured is $50,000 although only $38,000 was advanced to the borrower upon the execution of the deed of trust. I assume that the deed of trust in question does not contain a provision to the effect that if and when additional bonds are issued a supplemental indenture shall be recorded in the office in which the original deed of trust is first recorded, which supplemental instrument shall contain a statement as to the amount of additional bonds to be issued. If the deed of trust in question does not contain such a provision, then, in my opinion, the recordation tax should be based upon $50,000 rather than $38,000. In this connection you are referred to § 58-55 of the Code in which it is provided that on deeds of trust the tax shall be fifteen cents on every $100.00, or portion thereof, of the amount of bonds or other obligations secured thereby. Although only $38,000 in obligations have been issued, nevertheless, the instrument actually secures a total of $50,000 of obligations.

TAXATION—Recordation—Leases—Tax Based on Land Value. (223)

February 1, 1960

MRS. NELLY M. BYWATERS
Deputy Clerk of the Circuit Court of Culpeper County

I acknowledge receipt of your letter of January 25, 1960, to which you attached a copy of a lease dated September 4, 1959, by and between Culpeper Shopping Center and The Great Atlantic and Pacific Tea Company. You state that the facts as to the lease are:

"On the date of the Lease and on the date of the recordation, there were no buildings on the land. The land was stated to be of a value of $2,000.00, and the proposed buildings would be $50,000.00.

"I do not know when the buildings will be started, but it had not been started when the Lease was recorded."

Under Section 58-58 of the Code the tax should be based on the value of the land on the date the lease was executed. A similar question was presented to this office by the Commonwealth's Attorney for Northampton County on November 30, 1950. I understand the Honorable C. H. Morrissett has furnished you with a copy of our opinion of that date.

TAXATION—Recordation—Partition Deeds—Defined—Statute Contemplates Only One Deed Dividing Interests into Separate Parcels. (291)

March 28, 1960

HONORABLE FRANCIS A. TAYLOR
Clerk, Circuit Court of Hanover County

This is in reply to your letter of March 25, 1960, which reads as follows:
"The question has arisen as to what is a partition deed under § 58-57 of the Code of Virginia. That section sets forth that the recording tax on a deed of partition among joint tenants, tenants in common, or coparceners will be fifty cents.

"If five such persons own a tract of land and they divide it in kind by conveying to each his portion by a separate deed so that there are five deeds made instead of one, does each of the deeds constitute a partition deed subject to the recording tax of fifty cents instead of the usual recording fee of fifteen cents per hundred?

"On the other hand, if these persons partition their land by the conveyance of the portion of one of the persons interested to a stranger, and the remainder of the persons interested receive their share in kind, by a separate deed, would the deeds to these persons receiving their interest in kind be partition deeds subject to the fifty cent tax instead of fifteen cents per hundred? Of course the deed to the stranger, I assume, would be a conveyance and subject to the usual recording taxes of fifteen cents per hundred dollars of consideration or the actual value of the property, whichever is greater."

With respect to the question presented in the second paragraph of your letter, I am of opinion that the usual recording fee of fifteen cents on every one hundred dollars, or fraction thereof, of consideration or the actual value of the property conveyed, whichever is greater, would be required. With respect to the question presented in the third paragraph of your letter, I am of opinion that a similar recording fee would be necessary. The conveyance of a one-fifth interest in the property to a stranger takes a deed out of the category of a partition deed.

A partition deed as contemplated by § 58-57 of the Code is a deed executed solely for the purpose of dividing into separate parcels the interest of each joint tenant, tenant in common, or co-partner, as the case may be.

This question was considered by the Honorable Abram P. Staples while he was Attorney General and he handed down a similar opinion. While it may be that the question is not free from doubt, I would be reluctant to take a position contrary to that of Mr. Staples, due to the fact that the General Assembly has had several opportunities to amend the statute since the ruling by Mr. Staples was made. I enclose a copy of the opinion to which I have referred, which is published in the Report of the Attorney General for 1945-'46, at page 116.

TAXATION—Recordation—Subordination Agreement is Taxable Under § 58-58. (154)

HONORABLE B. B. ROANE
Clerk of Circuit Court of
Gloucester County

November 17, 1959

This is in reply to your letter of November 12, 1959, which reads as follows:

"I enclose herewith copy of an agreement of subordination this day presented in my office for recordation.

"Your opinion as to whether or not the same is subject to recordation tax under Chapter 3, Article 3 of the Code of Virginia, will be appreciated."

In my opinion, Section 58-58 of the Code of Virginia is applicable. It does
not appear that there is specific statutory reference to subordination agreements, but contracts of that nature seem to be included in that section of the Code.

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TAXATION—Tax and Revenue Officers—Prohibition Against Divulging Information Not Applicable to Tax Laws Administered by State Corporation Commission. (346)

May 11, 1960

THE HONORABLE J. LINDSAY ALMOND, JR.
Governor of Virginia

This will acknowledge your letter of May 5, in which you inquire whether your approval is necessary or required in order that the State Corporation Commission may make available to the Internal Revenue Service, United States Treasury Department, a list of registered owners of certain trucks subject to the tax imposed by the Federal Highway Revenue Act of 1956. The Commissioner of Internal Revenue Service, in a letter to you signed by Dana Latham, Commissioner, dated May 3, 1960, has requested your approval.

Section 58-46 of the Code of Virginia provides as follows:

"It shall be unlawful for any tax or revenue officer or employee to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties. Any violation of the provisions of this section shall be punished by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months or both; provided, however, that the Governor may at any time, by written order, direct that any information herein referred to shall be made public or be laid before any court; and, provided, further, that this inhibition does not extend to any matters required by law to be entered on any public assessment roll or book, nor to any act performed or words spoken or published in the line of duty under the law."

I understand that the State Corporation Commission is of opinion that it may not reveal the information desired by the Internal Revenue Service unless your approval is obtained.

Mr. Seibert, counsel for the Commission, states that the information sought by the Internal Revenue is contained in the records of the Commission in connection with its enforcement of Sections 56-304, 56-304.1 and 56-304.2. These sections do not directly relate to the information acquired in the collection of taxes or other revenue, except the one dollar fee charged under Section 56-304.4. These sections relate to classification plates, their display, exemption cards, and registration cards.

Section 58-46 makes it unlawful for any tax or revenue officer or employee to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his public duties. The section is contained in Chapter 2, Title 58 of the Code which relates to the Department of Taxation, the State Tax Commissioner, his general powers and duties, and to local tax officials. I am of opinion that its prohibitions relate to information acquired in connection with the administration of the tax statutes contained in Title 58 of the Code and not to information gathered in the administration of Title 56 of the Code.

It does not appear, therefore, that you have any responsibility in regard to the matter under consideration.
REPORT OF THE ATTORNEY GENERAL

TAXATION—Trailer Camps—Licenses—County and Town May Each Levy License Tax. (212)

HONORABLE STIRLING M. HARRISON
Commonwealth's Attorney of Loudoun County

January 15, 1960

This is to acknowledge receipt of your letter of December 22, 1959 in which you request my opinion as to whether license taxes imposed by the Town of Leesburg on trailer camps can be credited on the license tax imposed on trailer camps by Loudoun County.

Article 1.1 of Chapter 6, Title 35, Code of Virginia, grants the authority to the governing body of any political subdivision to impose license taxes on the operation of trailer camps. Loudoun County and the Town of Leesburg are political subdivisions, both of which have the authority to impose such a license tax. This license tax is entirely separate and distinct from the license taxes imposed by counties and towns under the provisions of Sections 46.1-65 and 46.1-66 of the Code, and by the State under the provisions of Section 46.1-149 of the Code.

It is my opinion that the Town of Leesburg and Loudoun County have the authority to impose a license tax upon the operation of trailer camps and trailer parks within the corporate limits of the Town of Leesburg, and both the County and the Town can levy license taxes on the same trailer camp. The payment of the license tax imposed by the Town cannot be credited towards the county license tax.

TAXATION—Undertakers—License Taxes—May be Subject to Both Retail Merchants and Undertakers Taxes. (235)

HONORABLE L. J. HAMMACK, JR.
Substitute County Judge of Brunswick County

February 11, 1960

This is in reply to your letter of February 8, 1960, which reads as follows:

"I should appreciate it if you would let me have your opinion on the following question:

"May the council of a city or town in Virginia legally impose two license taxes on a person doing business as an undertaker in said city or town, one of said license taxes being for the privilege of conducting the business of undertaker in said city or town and the other being for the privilege of conducting the business of retail merchant therein? For purposes of this inquiry, the person sought to be so taxed operates only an undertaking business, and the license tax sought to be imposed for conducting a retail merchant business would be based on sales necessarily made incident to conducting funerals in the undertaking business.

"If the council of the city or town may impose only one of the license taxes mentioned above, should that tax be for conducting the business of undertaker or for conducting the business of retail merchant?"
Under Section 58-266.1 of the Code, the council of a town may impose license taxes in addition to those imposed by the State. The State license tax on persons engaged in the undertaking business is imposed under Section 58-403 of the Code. This section provides that "Any person, firm or corporation engaged in the business of burying the dead shall be deemed an undertaker." Section 58-246 of the Code provides that when any person, firm or corporation is engaged in more than one business which is subject to taxation under the Virginia Code, such person shall pay the tax provided by law on each branch of the business.

As I understand your letter, the person operating an undertaking business in your town, and who is the subject of your inquiry, does not sell any supplies except in connection with each funeral he is conducting. If this is true, then he is not subject to the retail merchants' tax. However, if he sells coffins and other funeral supplies separate and apart from those that are used by him in connection with a funeral, then he would be subject to the retail merchants' tax upon such separate sales.

TORTS—State—Immunity Cannot be Waived—State has Consented to be Sued Only in Limited Cases. (325)

April 28, 1960

HONORABLE WILLIAM L. WINSTON
Member, House of Delegates

This is in reply to your letter of April 26, in which you request my opinion as to whether or not there is any way in which the State's immunity from suit can be waived and whether or not such waiver is ever made in cases of tort.

Under the provisions of Chapter 34 of Title 8 of the Code, the State has given its consent to be sued in certain cases, such as those arising out of contract. These statutory provisions, however, do not give the State's consent to be sued in tort actions. See Sayers v. Bullar, 180 Va. 222.

You will observe that this case also discusses the question of the immunity of the State in tort actions extending to State agents and employees where they are acting within the scope of their employment.

In my opinion the State agency charged with the responsibility of operating the Claytor Lake State Park does not have authority to waive the State's immunity.

TOWNS—Ordinances—May Not Adopt County Ordinances by Reference—Procedure for Adopting Zoning Ordinance. (344)

May 10, 1960

HONORABLE PHILIP LEE LOTZ
Commonwealth's Attorney for Augusta County

This is in reply to your letter of May 6, which reads as follows:

"The Town of Craigsville was incorporated by court order, effective January 1, 1960. It has not enacted any ordinances, and the order incorporating it does not provide for any law enforcement officers or a court."
"Two matters have arisen in connection with this town on which I would like to have your opinion.

A short time after the Town Council was elected, they met and a motion was made by a member of Council that all Augusta County ordinances then in effect in Augusta County be declared to be effective within the limits of the Town of Craigsville. This motion was seconded and unanimously adopted by the Town Council. No further action has been taken by the Council in this regard. I would like to know whether this action by the Town Council is all that is required to make the Augusta County ordinances effective within the limits of the Town of Craigsville.

The second matter on which I would like to have your opinion deals with the zoning. Augusta County has a Board of Zoning Appeals, established under a general zoning ordinance very much like that in effect in many counties in Virginia. A resident of the Town of Craigsville has requested the Board of Supervisors of Augusta County to issue a permit to operate an automobile grave yard within the town limits. If this request originated from any other source in the county, the usual procedure would be to refer the request to the Board of Zoning Appeals for a recommendation to the Board of Supervisors, who would then act upon it. It appears, however, that Sections 15-824 and 15-825 apply to the present request, that the Board of Zoning Appeals cannot act in this case unless and until the Town Council makes the request to the Board of Supervisors to so designate the County Zoning Board. It further appears that if the Board of Supervisors is unwilling to do this, the Town Council can apply to the Court for appointment of the Board of Zoning Appeals.

It will be readily seen that the two questions about which your opinion is sought are inter-related. If the action of the Town Council does not have the effect of establishing all County ordinances within the Town of Craigsville, then it might be said that the zoning ordinance is not applicable in that town, and the Board of Supervisors has no authority, pursuant to the above statute, to designate their Board of Zoning Appeals to serve for the town. If the ordinances, particularly the zoning ordinance, is in effect for the Town of Craigsville, then it would appear that the Board of Supervisors can make an election, under the statute, as to whether they wish their Board of Zoning Appeals to act for the town."

With respect to the effect of the action of the council adopting county ordinances by reference, I doubt that the council has authority to enact ordinances in such manner. The enactment of an ordinance is a legislative function and certainly the members of the council must have access to the text of an ordinance. The courts, in some jurisdictions, have been liberal in upholding the validity of ordinances which adopt statutory laws by reference to Code numbers. I am of opinion that under the method of adoption described by you the town would have no authority to enforce the ordinances. However, since the town is a part of the county, the ordinances of the county, until the town has adopted similar ordinances, continue to be enforceable within the corporate limits of the town. The town, of course, may not enforce county ordinances. It may only enforce those ordinances which have been adopted by the council in a proper manner.

The proper method by which a town council may adopt an ordinance is by motion or resolution containing the substance or contents of the ordinance.

With respect to the questions relating to zoning, I assume that the county adopted a zoning ordinance prior to the incorporation of the town of Craigsville. Therefore, pursuant to the provisions of § 15-844, the ordinance could,
and I assume did, include the area now included in the town. As I have pointed out, I am of opinion the town, under the method pursued, has failed to enact ordinances paralleling the county ordinances.

Since no zoning ordinance has been adopted by the town, I feel that the town council should take formal action under the following authority contained in § 15-824 of the Code.

"... . . . . In lieu of appointing a zoning commission for a town as provided in this section, the council of such town may if it so desires request the board of supervisors of the county in which the town is located to instruct the county zoning commission to serve also as the zoning commission for such town; and if the board of supervisors is agreeable to such request it may so instruct its county zoning commission; in which case the county zoning commission shall also serve as the zoning commission of such town. In the performance of its duties as the zoning commission of such town it shall be governed by the provisions of this article."

Such action by the town council will remove all doubt as to the authority of the county to enforce its zoning ordinances within the town. The town, no doubt, will eventually adopt its own zoning ordinance.

I enclose copies of two opinions relating to the automobile grave yard statutes.

TREASURERS—City Treasurer Not Required to Accept Check in Greater Amount Than State Taxes Due—May Accept and Forward Balance to City Collector. (286)

Honorable R. C. Sullivan
City Treasurer of the City of Alexandria

March 21, 1960

I am writing in further connection with your letters of February 25 and March 3, 1960, and my letter of March 4, 1960, upon the question of whether or not you are required to accept, in payment of State taxes, a check which also includes an amount in payment of taxes imposed by the City of Alexandria. Your inquiry arises from the following context of your initial communication:

"The Charter of the City of Alexandria, Virginia, requires a City Treasurer and a City Collector. The duty of the Treasurer is to be the custodian of all City funds after they have been collected by the City Collector, and deposited in the name of the City of Alexandria, Virginia, R. C. Sullivan, Treasurer, and to disburse all funds after they have been properly authorized by the office of the Director of Finance.

"The Treasurer is also required to collect State Income Taxes, State Merchant Licenses, Dog Licenses, Capital, and State Capitation Taxes for State purposes.

* * * *

"The duty of the Commissioners being to make up the tax bills from the returns filed by the taxpayers and attach their checks to said tax bill on an assessment sheet each day, and turn same over to the Treasurer. A number of the checks handled by the Commissioner and turned over to the Treasurer cover other items other than the payment of State Income Taxes, such as City of Alexandria Personal Property Tax. For instance, John Doe, owes State Income Tax of $100.00, and Personal Property Tax of $50.00. His check reads $150.00, of which
the State would receive $100.00, making the difference of $50.00, for Personal Property Tax."

With respect to the specific question you present, I do not believe that you are required to accept a check of the type under consideration in payment of State taxes. In this connection, I am of the opinion that it would be appropriate for you to return the check in question to the maker thereof, instructing him to forward to you a check in the amount due for State taxes and requesting him to forward to the City Collector a separate check for whatever amount may be due the City of Alexandria for local taxes. However, I also believe that it would be permissible for you to accept a check given in payment of both State and city taxes, deposit the same for collection and subsequently forward to the City Collector your Treasurer's check in the amount shown to be due the City of Alexandria for taxes imposed by the city.

TREASURERS—County—Disposition of Records. (147)

November 6, 1959

HONORABLE V. S. PITTMAN, Treasurer of Southampton County

This is in reply to your letter of November 4, 1959, which reads as follows:

"Our county is in the process of remodeling our court house and erecting an addition thereto, to house the clerk of the court, the commissioner of the revenue and the treasurer. The records of the office of treasurer are stored in a room over the court house and the attic of the building I am in and are not in the best condition. I would hate very much to move a lot of these dirty records into a new building. I want to know just what part of these records I have a right to destroy? I have been treasurer for thirty years and have never had to refer to any record over three years old."

As you know, the county treasurer acts as an agent of the State in the collection of certain State taxes. His tax records, therefore, are State records as well as county records. Section 42-59 of the Code of Virginia provides that no agency of the State government shall sell, destroy, give away or discard any record or records unless specifically so authorized by law, without having first informed the State Librarian and the Comptroller. After these gentlemen have examined such records, this provision of the Code allows the destruction or disposition of those records determined to have no administrative value, historical value or value as financial records. The statute prohibits the destruction of any land or personal property book.

In 1956, the General Assembly enacted § 58-919.1 of the Code, which allows a county treasurer, with the consent of the governing body, to cause all tax tickets, payment of which has been received, to be photographed, microphotographed, or recorded by some similar process. After such reproductions have been made and filed, the treasurer may, with the approval of the governing body, cause the tax tickets so reproduced to be destroyed. This section does not apply to any tax tickets except those for taxes for a tax year more than five years prior to the year in which such reproduction is performed.

Other than the foregoing, I am unaware of any statutory authority for destruction of any of the records of your office which pertain to the collection of State taxes.
TREASURERS—Not Required to Accept Checks in Amount Greater Than State Taxes Due—Collecting Officer. (298)
Commissioners of Revenue—Assessing Officer Only—No Duty to Return Checks to Taxpayers Where Amount in Excess of State Taxes. (298)

Honorable R. C. Sullivan
City Treasurer of the City of Alexandria

This is in reply to your letter of March 24, 1960, in which you make the following request:

"I wish you would clarify your opinion on this matter as I am only interested in the following: Kindly render me your opinion at an early date, stating if the Treasurer of a City or County is required to accept a check from the Commissioner of the Revenue on the assessment sheet, which covers payment of State Taxes and also other items for payment of City Taxes."

The opinion which you wish clarified was furnished to you by this office on March 21, 1960, and related to the procedure in connection with the handling of checks attached to tax returns filed with the commissioner of the revenue. Specifically, the question involved in that opinion was what disposition the commissioner of the revenue should make of a check which includes payment of both state and local taxes when the collector of state and local taxes are different officials. We adhere to the conclusions stated in that opinion.

There is no statute specifically dealing with an administrative procedure such as is involved here. Since the question is purely administrative, we have referred your letter of March 24th to Honorable C. H. Morrissett, State Tax Commissioner, and we enclose herewith a copy of his reply dated March 30, 1960.

You will note that the State Tax Commissioner points out that the commissioner of the revenue is not a collecting officer but that he is merely an assessing officer. He further points out that the treasurer is the collecting officer.

We concur with the conclusion reached by the State Tax Commissioner wherein he states that there is no duty upon the commissioner of the revenue to return checks to the taxpayers which include payments of both state and local taxes when the collector of state and local taxes are different officials. We adhere to the conclusions stated in that opinion.

TREASURERS—Scholarship Grant Warrants—May Not be Received by Treasurer in Payment of Taxes. (278)
Schools—Scholarship Grants—Warrants—Parent or Person in Loco Parentis Has No Personal Proprietary Interest in Warrant. (278)

Honorable William J. Phillips
Commonwealth’s Attorney for Warren County

This will reply to your letter of March 21, 1960, in which you inquire whether
or not the provisions of Sections 58-921 and 58-922 of the Virginia Code would be applicable to warrants drawn in payment of tuition grants for the education of children pursuant to the provisions of Section 22-115.22 et seq. of the Virginia Code.

In pertinent part, Sections 58-921 and 58-922 of the Code of Virginia (1950) provide:

"Sec. 58-921.—. . . (The county treasurer) shall receive in payment of the county levy any county warrant drawn in favor of any taxpayer, whether such warrant has been entered in the treasurer's book or not, but if the warrant has been transferred it shall be subject to any county levy owing by the taxpayer in whose favor the same was issued. When the warrant is for a larger sum than the county levy due from the payee or transferee of the warrant, the treasurer shall endorse on the warrant a credit for the amount of the county levy so due and such payee or transferee shall execute to the treasurer a receipt for such amount, specifying the number and date of the warrant on which it was credited; and the residue of the warrant shall be paid according to the order of its entry in the treasurer's book."

"Sec. 58-922.—In the payment of any warrants lawfully drawn on account of allowances made against the Commonwealth the treasurer of any county or corporation paying such warrants shall first deduct all taxes due by the party in whose favor the warrant is drawn; and if such warrant be insufficient to pay the entire amount due, then such treasurer shall credit the tax bill by the amount of the warrant."

The above quoted statutes formerly existed as Sections 2782 and 2784 of the Code of Virginia (1919) and as Sections 356 and 358 of the Virginia Tax Code. The provisions of Chapter 7.2 of Title 22 of the Virginia Code, entitled "Scholarships for Education of Children" and codified as Sections 22-115.22 through 22-115.28 of the Code of Virginia (1950) as amended, were enacted by the General Assembly of Virginia during its Extra Session of 1959. Section 22-115.22, which states the policy of the Commonwealth upon the education of children in Virginia, declares that it is desirable and in the public interest that scholarships should be provided from the public funds of the State and localities "for the education of the children" in nonsectarian private schools and in public schools located outside of the locality where the children reside.

In furtherance of this policy, Section 22-115.23 directs the governing body of each county, city or town constituting a separate school district to appropriate out of the general tax revenues of the locality and out of funds made available to the locality by the State such amounts as may be necessary to provide specified minimum scholarships "for children of school age" residing in the locality, but attending nonsectarian private schools or public schools located outside of such locality. Moreover, Section 22-115.24 prescribes that such funds "shall be appropriated and recorded separately" from funds made available to the school board for the maintenance and operation of the public schools and that "no funds appropriated for scholarships shall be used or be available to be used for the maintenance or operation of the public schools".

Section 22-115.26 specifies the amount of the minimum scholarship to be provided out of joint State and local funds "for each child for a full school year" and the amount which each locality shall contribute out of local tax revenues for each scholarship provided "for a child residing in such locality" during the year. This statute further prescribes:

"The amount of the scholarship shall be paid to the parent or guardian of, or the person standing in loco parentis to, the child. The local school board shall require the recipients of the scholarship funds to
REPORT OF THE ATTORNEY GENERAL

furnish receipts or other evidence showing that the funds were expended for the purpose for which the scholarships were granted.” (Italics supplied).

Finally, Section 22-115.27 makes it a misdemeanor for any person to obtain or expend any scholarship funds for any purpose other than in payment of or reimbursement for the tuition costs for the attendance “of his child or ward” at a nonsectarian private school or public school located outside of the locality making such scholarship grant.

In light of the statutory provisions outlined above, I am of the opinion that a warrant issued under Section 22-115.28 to the parent, guardian or other person standing in loco parentis to a child is made payable to such person as trustee of such funds for the benefit of the child in question. I think it is manifest that the scholarship grants contemplated by the statutes under consideration are made for the benefit of children of school age in furtherance of their education and not for the benefit of the parent, guardian or person standing in loco parentis to such children. Thus, although warrants representing scholarship grants are made payable to the latter individuals, such individuals have no personal proprietary interest in the funds covered by the warrant, and I do not believe that parents, guardians or persons in loco parentis should be deemed to constitute “the taxpayer in whose favor” the warrant was issued or “the party in whose favor the warrant is drawn” within the meaning of Sections 58-921 and 58-922 of the Virginia Code. I am, therefore, of the opinion that the provisions of Sections 58-921 and 58-922 would not be applicable to warrants drawn in payment of tuition grants pursuant to the provisions of Section 22-115.22 et seq. of the Virginia Code.

TREASURERS—Warrant Checks—Only One Deputy May be Designated to Countersign. (171)

December 1, 1959

HONORABLE COLIN C. MACPHERSON
Treasurer of Arlington County

This is in reply to your letter of November 30, 1959, which reads, in part, as follows:

“I respectfully request an opinion and ruling as to the authorization of an additional Deputy Treasurer to sign County checks.

“The officer of the County Treasurer in Arlington is of such size and magnitude that it is deemed advisable to have more than two persons in the office with authority to sign checks on behalf of the County. The office consists of approximately forty employees and during the fiscal year 1958-59 handled cash transactions amounting to over $62,000,000.00.

“At present, I have one deputy who is authorized to sign checks. Various duties require the Treasurer's frequent absence from his office, thereby leaving only one person who may sign checks for the County. If illness or other emergencies should befall the deputy remaining, there would be no one who could sign or endorse County checks.”

You refer to Section 58-951 (4) of the Code of Virginia and call attention to an opinion issued by this office under date of January 25, 1950 to Honorable F. B. Huber, Treasurer of Campbell County, relating to this subject. The opinion to which you refer is published in Report of the Attorney General for 1949-50,
at page 239. In that opinion the view was expressed that Section 350 of the Tax Code of Virginia limited to one the number of deputies who may be given authority to sign checks. There have been no subsequent opinions issued by this office in connection with this statutory provision which is now Section 58-951 (4) of the Code. There have been no amendments to this section since the opinion referred to above was issued.

The last paragraph of your letter is as follows:

"In view of the lapse of time and change of circumstances and conditions since the above mentioned opinion, I now inquire as to whether or not there may now be more than one deputy authorized to sign checks, such appointment to be made in accordance with Section 58-951 (4) of the Code of Virginia."

The General Assembly has had several opportunities to amend this Code section subsequent to the time the opinion referred to above was rendered and its failure to enact any legislation with respect thereto is considered an affirmation of the ruling of this office.

I regret I am not in position to depart from the opinion expressed by my predecessor. If there is necessity for more than one deputy to sign checks in any county, it is a matter for legislative action.
the Museum as determined by its Board of Trustees, and, further, that should any part of the Membership Revenues exceed the estimated revenues, as submitted on G. O. Budget Form 2, REVENUE ESTIMATES, such balances should remain available for use by the Virginia Museum as determined by the Board of Trustees and that such balances shall not revert to the State Treasurer either at the end of a fiscal year or at the end of a biennium."

You have requested my opinion as to the legality of setting aside the revenues from the membership dues for the use of the Museum as determined by the Board of Trustees.

Section 9-84 of the Code of Virginia provides as follows:

"All money received by the Museum for current expenses in conducting the Museum shall be paid into the treasury of Virginia, where it shall be set aside as a special fund for the operation of the Museum, for which purpose such money is hereby appropriated, to be paid by the State Treasurer on warrants of the Comptroller issued upon vouchers signed by the president of the Museum or his duly authorized agent. The Museum shall be deemed to be an institution of higher education within the meaning of § 23-9.2 of the Code of Virginia."

In my opinion, under this section the dues in question should be set aside in a special fund for the operation of the Museum. It would seem that under this section the legislature did not intend that any of the nonexpended funds from this source should revert to the general fund.

In order to clarify the matter a suitable provision could be inserted in the Appropriation Act. A similar provision is contained in the Appropriation Act with respect to the Commission of Game and Inland Fisheries—Item 324 of the Appropriation Act.

VIRGINIA STATE BAR—Witnesses—Fees for Mileage and Attendance. (143)

October 29, 1959

HONORABLE R. E. BOOKER
Secretary-Treasurer
Virginia State Bar

This is in reply to your letter of October 27, 1959, which reads as follows:

"The District Committees of the Virginia State Bar conduct investigations in matters involving improper conduct of lawyers. The Rules of the Virginia State Bar, Sec. IV, Rule 13, provide that the District Committees may, through its officers or members, issue subpoenas for witnesses to appear before them. In a recent hearing before one of the District Committees, the following occurred:

1. Request was made by a witness summoned on behalf of the committee that she be reimbursed for two days' loss of earnings and her mileage in attending the hearing.

2. Counsel for accused lawyer had several witnesses summoned and mileage and attendance fee was requested on behalf of these witnesses.

I would appreciate your advising me at your first convenience what
are the duties and responsibilities of the Virginia State Bar in reference to the above questions.

"I might add that in the past the Virginia State Bar has paid mileage and witness attendance fees to persons summoned on behalf of the committee, but so far as I recall, it has never paid either the mileage or witness fees for persons summoned on behalf of the accused lawyer."

The Virginia State Bar is an agency of the Commonwealth, and the proceedings had in such cases are statutory, or under Rules promulgated pursuant to statutory authority. Title 54 of the Code does not contain any provision relating to allowances to witnesses, and I do not find any such provision in the Rules of the Supreme Court. In my opinion, the statutes pertaining to witness fees in Commonwealth cases are applicable.

With respect to question (1), I am of the opinion that such witnesses are entitled to the allowances provided for in Section 14-186 of the Code.

With respect to question (2), I am of the opinion such witnesses are entitled to the allowances provided for in Section 14-187 of the Code, which allowances, however, may not be paid out of State funds. Section 14-188 of the Code provides that the sum to which a witness is entitled shall be paid out of the (State) treasury in any case in which the attendance is for the Commonwealth, except where it is otherwise specially provided. In all other cases such allowances shall be paid by the party for whom the summons was issued.

Of course, the Virginia State Bar fund in the State treasury is the fund out of which Commonwealth witnesses in such cases would be paid.

In the event the person against whom the complaint was made should prevail, neither he nor any witness summoned on his behalf may recover such costs from the Commonwealth, due to the provisions of § 14-197 of the Code.
he worked. Mr. Chilton contends that he is entitled to the full $1200.00 deduction which the law clearly states and nowhere does the law state that this exclusion can be prorated.

"Mr. Charles H. Smith, Director, stated in his letter to Mr. Chilton on April 11, 1960, that this Act has been construed to mean a $100.00 monthly exclusion and since this construction is wholly in conflict with the Code Section mentioned herein above, I desire to know by whom such a construction was made and by what authority."

I am of opinion that the position taken by the Virginia Supplemental Retirement System is correct. Under the provisions of Code § 51-111.10(15) the "creditable compensation" of a person is calculated on an annual basis—that it, if a person has earned during a full calendar year the sum of $10,000, his creditable compensation will be that amount less $1200. The $1200 which is to be deducted contemplates that a person will have served and earned compensation for a full year. If a person is employed for only six months his full compensation is not what he would have earned in a full year of employment and, therefore, the proper amount to deduct would be $600.00, which would be one-half of a per annum deduction.

This statute has been construed liberally so as to achieve the maximum benefits contemplated under the Act. The retirement allowances to which a person is entitled are based upon the average of his annual compensation over the preceding five highest consecutive years of creditable service, or the entire period if less than five years. Generally the most recent years of creditable service are the highest. Under the theory suggested by you the average final compensation upon which benefits would be based could conceivably be much less if $1200 is deducted from three months salary. I think that the $1200 must be construed to mean that amount for full year's service and that when the service is less it shall be prorated. In this instance Mr. Chilton only served and earned compensation during three months of 1960. Therefore, the amount deductible would be $300.00. A contrary interpretation, in my opinion, would, in most instances, be defeating the manifest intention of the Act—that is, that the person who has retired shall receive the maximum average final compensation.

VIRGINIA SUPPLEMENTAL RETIREMENT SYSTEM—State Police—Disability Retirement Allowance May be Reduced if Beneficiary Engages in Occupation Prior to Normal Retirement Date. (313)

HONORABLE CHARLES H. SMITH, Director
Virginia Supplemental Retirement System

This is in reply to your letter of April 12, 1960, in which you inquire as to whether Section 51-140 of the Code of Virginia provides authority for application of Section 51-111.62 of the Code, in the case of a police officer retiring for disability under Section 51-136(c) of the Code.

Section 51-136(c) of the Code is part of the retirement system created for the State police officers of the Department of State Police, which is codified as Chapter 5, Title 51 of the Code of Virginia of 1950, as amended. Section 51-140, also a portion of the aforesaid Chapter 5, empowers the Board of Trustees of the Virginia Supplemental Retirement System to administer the State Police Retirement System. The section provides, in part, as follows:

"* * * Except as otherwise provided in this chapter the provisions of the Virginia Supplemental Retirement Act are applicable and shall
apply to and govern the operation of the retirement system established hereby."

In view of the foregoing quoted provision, I am of the opinion that the provisions of the Virginia Supplemental Retirement Act are applicable to the retirement system established for State police officers, insofar as consistent with the provisions of Chapter 5, Title 51 of the Code.

Section 51-111.62 of the Code grants authority to the Board of Trustees for reducing the allowance to any beneficiary of a disability retirement allowance, if prior to his normal retirement date, such beneficiary engages in, or is able to engage in, a gainful occupation which pays more than the difference between his disability retirement allowance and his average final compensation.

There is no provision in Chapter 5, Title 51 of the Code which alters or conflicts with the provision in Section 51-111.62 of the Code. I am, therefore, of the opinion that the Board of Trustees may apply Section 51-111.62 of the Code in the case of a police officer retiring for disability under Section 51-136(c) of the Code.

VITAL STATISTICS—Commonwealth has Preempted Field—Political Subdivisions May Not Supplement State Law—Local Registrars Under State Control. (303)

HONORABLE DEANE HUXTABLE
State Registrar

April 6, 1960

This is in response to your letter of March 30, 1960, in which you refer to the new Vital Statistics Act which is Chapter 451 of the Acts of Assembly, 1960, which is effective on July 1, 1960. Your letter reads, in part, as follows:

"As a result of the recent passage by the Legislature of the new Vital Statistics Act, certain questions have come up concerning local ordinances that are now in effect in various parts of the State regarding the registration and issuance of certified copies of birth and death records.

"Examples of such ordinances are that in some areas the registrars may not charge fees for issuing certified copies. Also, some areas have ordinances requiring the filing of death certificates in duplicate so that one copy may be retained by the local registrar.

"My specific question is, at what point under Virginia law and procedures may local ordinances supplement State law and regulations in a given activity? I realise that any conflict would be resolved in favor of the State statutes; however, if the statutes and regulations are silent on a given subject may ordinances then be put into effect? More specifically, when the statutes require that a certificate of each death be filed with the registrar, may a local ordinance go further and require that a certificate be filed in duplicate? The same reasoning could be applied to fees. For example, if the State requires a fee of $1.00 for a certified copy, may the local ordinance state that certified copies issued locally should be free of charge?"

The new Vital Statistics Act is all encompassing in its provisions, and I am, therefore, of the opinion that the State has preempted this field.

Sections 32-353.9 through 32-353.12 relate to the duties of local registrars. These sections contemplate that the local registrars shall be under the control and supervision of the State Registrar who operates under State law.
Therefore, the questions presented in the third paragraph of your letter, as quoted herein, must be answered in the negative.

WAGE ASSIGNMENTS—State Employees—Amount of Statutory Exemption May Not Be Assigned, Only Portion Subject to Garnishment May Be. (227)

February 9, 1960

HONORABLE ALFRED E. H. RUTH
Director of Mental Hospitals

This is in response to your letter of February 5, 1960, which reads as follows:

"It has come to my attention that the Employees Credit Unions of several of the State mental hospitals are obtaining an assignment of wages from State employees who borrow from the credit union.

"A question has been raised as to whether or not salaries and wages due a State employee may be lawfully withheld from the employee and paid to an Employees Credit Union on the basis of such a purported assignment of wages.

"Your opinion on this question is respectfully requested. A copy of the form of assignment being currently used at Central State Hospital is attached hereto."

Section 34-29 of the Code, as amended, contains the provisions of law governing exemption of certain portions of the wages of a laboring man from garnishment. The first fourteen lines of § 34-29 contain the aforesaid exemptions, and the portion following the same is as follows:

"* * * and every assignment, sale, transfer, pledge or mortgage of the wages or salary of a laboring man which is so exempted, to the extent of the exemption provided for by this section, shall be void and unenforceable by any process of law."

The Supreme Court of Appeals has stated that:

"Under the Constitution of Virginia, section 193, and by the great weight of authority, homestead exemption provisions are considered as remedial, and the rule is that they must be liberally construed in favor of the debtor and strictly against the creditor. They are enacted to insure the unfortunate debtor and his equally unfortunate, but more helpless, family a means of shelter and a measure of existence." (Goldenburg Co. v. Salyer, 188 Va. 573, 577).

I am, therefore, constrained to believe that the language of § 34-29, set forth above, must be construed in a literal manner. A laboring man may assign or pledge only such portion of his wages as are subject to garnishment. Should he assign any greater portion of his wages, such assignment is made "void and unenforceable by any process of law," and such exemptions may not be waived. I am, therefore, of the opinion that the assignment by an employee of the Department of Mental Hygiene and Hospitals of his wages, which assignment is not made in conformity with § 34-29, is void, and that the Department may not withhold such wages from the salary of an employee.
WAGES AND SALARY—Head of Household Exemption—Construction of § 34-29 of Code. (35)

HONORABLE KOSSEN GREGORY
Member of the House of Delegates

This is in reply to your letter of July 27, 1959, which reads as follows:

"I have been requested to obtain an opinion for the construction of Section 34-29 of the Code of Virginia, 1950, as amended in 1958.

"The Statute involved is herewith set out:

"34-29. What wages or salary of laboring man exempt; assignment, etc., void—In addition to the estate, not exceeding the value of two thousand dollars and the other property, which every householder or head of a family residing in this State shall be entitled to hold exempt, as provided in the preceding chapters of this title, wages or salary owing or to be owing to a laboring man who is a householder or head of a family, whether a resident or non-resident of this State, shall be exempt from distress, levy, garnishment or other process to the extent of seventy-five per centum of such wages or salary; provided, however, that in no case shall such exemption be less than one hundred dollars per month nor more than one hundred fifty dollars per month; provided such minimum and maximum exemptions shall be increased by fifteen dollars per month for each dependent child of such householder or head of a family; and the wages or salary of a laboring man residing within or without this State who is not a householder or head of a family shall be so exempt to the extent of fifty per centum of the exemption herein provided for a laboring man who is a householder or head of a family; and every assignment, sale, transfer, pledge or mortgage of the wages or salary of a laboring man which is so exempted, to the extent of the exemption provided for by this section, shall be void and unenforceable by any process of law. In determining the exemption to which the employee is entitled the employer may until otherwise ordered by the court reply upon the information contained in the employee's withholding exemption certificate filed by the employee for federal income tax purposes and any person showing more than one exemption thereon shall be considered by him to be a householder or head of a family. The exemption granted under this section to a laboring man who is a householder or head of a family shall extend to any person under an order of a court to support a parent, child, husband or wife and may be claimed by him or on his behalf by any agency or government or person in interest. (Code 1919, Section 6555; 1928, p. 348, 1938, p. 574; 1948, p. 489; 1952, c. 432; 1954, cc. 143, 379; 1958, cc. 217, 417.) (1958 Amendment italicized.)

"The following inconsistent constructions have been placed on the italicized portion of the said statute by the local Courts not of record and several attorneys differ among themselves as to the practical application of same:

"Construction (A): The proper amount of wages to be held exempt is determined by adding $15.00 per dependent child to both the $100.00 minimum and the $150.00 maximum exemptions provided and then taking 75% of the salary wage earner is making. The higher of these
two results is used provided the figure does not exceed $150.00 plus $15.00 per child.

"Example 1. Wage earner makes $160.00 per month and has three children. His minimum exemption is raised to $145.00 and his maximum exemption is raised to $195.00. 75% of his wages is $120.00; therefore his exemption is $145.00.

"Example 2. Wage earner makes $200.00 per month and has three dependent children. His minimum exemption is raised to $145.00 and his maximum exemption is raised to $195.00. 75% of his wages is $150.00; therefore his exemption is $150.00. (If he had no children his exemption would still be $150.00).

"Construction B: The proper amount of wages to be held exempt is determined by first taking 75% of the wages receivable, which is his minimum provided it does not exceed the maximum of $150.00, to which figure is added $15.00 for each child.

"Example 1. Wage earner makes $160.00 per month and has three dependent children. His minimum exemption is 75% of his salary, $120.00 plus $45.00 or $165.00. (His maximum exemption is $195.00.)

"Example 2. Wage earner makes $200.00 per month and have three dependent children. His minimum exemption is 75% of his salary, $150.00 plus $45.00 for the children or $195.00. (His maximum exemption is $195.00). (If he had no children his exemption would be $150.00.)

"Therefore, I respectfully request that the Attorney General of Virginia render an opinion on the question hereinabove propounded."

The proper construction of the Code section in question is, in our opinion, as follows:

The amount of wages to which a householder or head of a family (who has no dependent children) is entitled to claim exempt is the basic exemption of 75% of his monthly wage. This is subject to the following limitations: (1) The minimum of $100.00 and (2) the maximum of $150.00. Thus, if such a person has a monthly wage of $100.00, all of his wage is exempt. If his monthly wage is $150.00, his exemption is $112.50. If his monthly wage is $300.00, his exemption is $150.00, since this is the statutory maximum, although 75% of $300.00, is $225.00.

If the wage earner has dependent children, he is entitled to an increase in both minimum and maximum exemptions of $15.00 per dependent child. Thus, if such person has one dependent child and his monthly wage is $150.00, his exemption is $115.00, ($100.00 minimum, plus $15.00 for the dependent child), despite the fact that 75% of his monthly wage totals $112.50. In this instance the 75% of monthly wage basic exemption is exceeded by the statutory minimum of $115.00 for a householder or head of a family with one dependent child.

If a person who has a monthly wage of $300.00 has one dependent child, his maximum exemption is $165.00. In this instance the 75% of his monthly wage exceeds the statutory maximum of $165.00 for a householder or head of a family with one dependent child.

This seems to be in accord with your construction (A).

Examples 1 and 2 under Construction (A) are, in my judgment, correct.

As a further example, we will assume a wage earner has a wage of $400.00 per month. The basic exemption is $300.00, or 75% of his monthly wage. If this person does not have any dependent children, his exemption will be $150.00, which is the statutory maximum. This maximum is increased $15.00 for each dependent child.

Construction B, and the examples given thereunder are not in accord with our interpretation of the statute.
WATER AND SEWER AUTHORITIES—Authority May Elect to Participate in Va. Supplemental Retirement System—No Authority to Establish Private Pension Plan—May Participate in Group Insurance Plan Administered by Retirement System. (362A)

HONORABLE JULIUS GOODMAN
Commonwealth's Attorney for Montgomery County

This is in reply to your letter of May 18, which reads as follows:

"There is what is known in Montgomery County, Virginia, the 'Blacksburg-Christiansburg and V. P. I. Water Authority', which was organized under the laws of Virginia (Virginia Water and Sewer Authorities Act). There are only four employees working for the said Authority at the present time. What I would like to know is this: "Can the 'Blacksburg-Christiansburg and V. P. I. Water Authority', contribute either a part, or all, on premiums for a pension plan for the employees, and also, can the said Authority take out an insurance policy and pay the premium therefor, for their key man who is titled the Superintendent? In other words, a 'key man' life insurance policy."

Chapter 22.1, Title 15, of the Code, under which an Authority of this nature is established does not authorize expenditures for the purposes stated in your letter. In my opinion, the only method by which the Authority may provide for pension or retirement benefits to its employees is by electing to participate in the Virginia Supplemental Retirement System which is operated under Chapter 3.2, Title 51, of the Code. If the Authority decides to bring its personnel under this system, it should contact the Honorable C. H. Smith, Director of the Virginia Supplemental Retirement System, State Finance Building, Richmond, Virginia, who will advise as to the proper procedure.

With respect to life insurance, the recent session of the General Assembly established a method whereby group life insurance may be obtained. This program will be administered by the Virginia Supplemental Retirement System, and Mr. Smith can advise you as to the procedure. The insurance provisions are contained in Sections 51-111.67:1 through 51-111.67:13 of the Code. We do not have extra copies of these new sections, but you may obtain them from Mr. Smith.

WELFARE AND INSTITUTIONS—Prison Labor—State Industrial Farm Laundries—May Not be Utilized to Provide Services for Private Individuals. (25)

COLONEL RICHARD W. COPELAND
Director, Department of Welfare and Institutions

This is in reply to your letter of July 16, 1959, which reads as follows:

"You are no doubt aware of the fact that this Department operates two rather large laundries, one at the State Industrial Farm for Women, Goochland, and the other on the Powhatan side of the State Farm for Men. Such State institutions as the Medical College of Virginia, the University of Virginia Hospital and the Blue Ridge Sanitorium are serviced by these two laundries.
"Longwood College at Farmville operates a laundry for its students, doing the work for them on a $20.00 yearly fee basis. Their plant is old and needs remodeling as well as to expand. There appears to be no available land for needed expansion. The college has expressed an interest in having this Department perform this service for it on the same basis we now operate regarding the work done for the State institutions above mentioned. In the latter mentioned institutions, the items laundered belong to said institutions rather than to individuals. Of course, the reverse is true at Longwood College.

"Likewise, certain of the State mental hospitals are interested in having us do the laundry for the staff and nurses of these hospitals. Again, in this instance, the uniforms, etc., belong to the individuals employed therein rather than to the hospitals.

"In your opinion, are we permitted to supply the services requested by Longwood College and certain of the mental hospitals? Your kind advice and help is greatly appreciated."

Section 53-125 of the Code provides:

"The operation of the Industrial Farm for Women shall be under the control of the Director in the manner now provided or which shall be provided for the operation of the penitentiary system."

Article 3 of Chapter 2, Title 53, Code of Virginia deals with prison goods and provides for the disposal of goods manufactured or produced within the penitentiary or at the State Farms. This Article does not contemplate the disposal of goods to private sources. Subject to the exception regarding the furnishing of prison labor for farm work under certain conditions, there is no provision authorizing the use of prison labor for private individuals.

While there is no specific statute prohibiting the use of a State owned and operated laundry in the manner suggested in your letter, I am of the opinion that the prohibitions relating to the sale of goods establishes grounds for concluding that the General Assembly has adopted a policy against the use of State equipment and State prisoners for rendering service to private individuals, especially where the services rendered will be in competition with private business establishments.

WITNESSES—Fees—Criminal Cases—Physician—Per Diem Fee Allowed by Section 19-207 of Code Not Applicable Unless Physician Appointed by Court—Court May Allow Reasonable Compensation for Professional Services. (321)

April 22, 1960

DR. HIRAM W. DAVIS
Commissioner
Department of Mental Hygiene and Hospitals

This is in reply to your letter of April 18, enclosing a letter from Dr. Joseph R. Blalock, Superintendent of South Western State Hospital. Dr. Blalock in response to a subpoena, testified as an expert witness in a criminal case pending in a court of record. He requested an allowance of $15.00 per diem under the provisions of § 19-207 of the Code, which was disallowed by the trial judge, who took the position that Dr. Blalock had not been appointed by the court to examine the defendant pursuant to § 19-202 of the Code. The court stated that, in its opinion, the compensation payable to Dr. Blalock is controlled by § 14-186 of the Code. Under this latter section the witness fee is
fifty cents, plus certain allowance for travel, provided the travel is over five miles going and returning to the place of trial.

This office has heretofore held that § 19-207 does not apply unless the physician was appointed by the court pursuant to § 19-202. To this extent I am in agreement with the ruling made by the court. However, I am of opinion the court has authority to allow reasonable compensation in such cases under § 19-291 of the Code. A service such as was rendered by Dr. Blalock is a professional service for which no specific compensation is provided.

The Honorable Abram P. Staples, during his service as Attorney General, rendered two opinions relating to this matter, and I enclose two copies of each opinion. These opinions are published in the Report of Attorney General for 1938-'39 at pages 50 and 51.

I also enclose two copies of a later opinion rendered by Governor J. Lindsay Almond, Jr., during his tenure of office as Attorney General. This opinion is published in the Report of the Attorney General for 1949-'50, at page 80.
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